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In The

Supreme Court of the United States

October Term, 1990

ELBERT L. HATCHETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether evidentiary rulings which totally deprive a defendant of his right to present facts critical to his only defense constitutes a violation of rights guaranteed by the Fifth and Sixth Amendments of the United States Constitution.

2. Whether a sentence which requires a defendant to pay restitution in the form of back taxes for years for which he was acquitted violates his Due Process rights.

PARTIES

The Petitioner in this Court is Elbert L. Hatchett, who was the defendant in the proceedings below. Respondent is the United States of America.

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No. _____

In The

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October Term, 1990

ELBERT L. HATCHETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Elbert L. Hatchett respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Sixth Circuit Court of Appeals entered in this proceeding on November 7, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals For The Sixth Circuit is reported *sub nom. United States of*

America v. Elbert L. Hatchett, 918 F.2d 631, *reh'g den'd.* ___ F. 2d ___, (6th Cir. 1991) and is reprinted in the Appendix hereto at 1.

The opinion of the United States District Court for the Eastern District Of Michigan, which is not reported, is set out in the Appendix hereto at 37.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on November 7, 1990. A timely motion for rehearing was denied on February 6, 1991. App. 37 This petition is filed within 60 days of the order denying rehearing.

The jurisdiction of this Court to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, Rule 801 of the Federal Rules of Evidence, and 18 U.S.C. §3651.

STATEMENT OF THE CASE

Petitioner, Elbert L. Hatchett, a practicing attorney, (hereafter "Petitioner") and his wife, Laurestine Hatchett, were named as Defendants in an eight count indictment

filed on October 20, 1988, charging petitioner with three felony tax violations and his wife with one felony tax violation.[1] Appendix at 49 (hereafter "App."). Additionally, petitioner was charged with five misdemeanor counts of willful failure to pay taxes for the years 1982 through 1986 under 26 U.S.C. §7203.

To prove its case in chief, the government introduced voluminous evidence concerning petitioner's financial condition and his relationship with the Internal Revenue Service ("IRS").[2] The government sought to establish that

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[1] Petitioner and Laurestine Hatchett were charged with willful attempt to evade or defeat the payment of taxes under 26 U.S.C. §7201. App. 49 Petitioner was singularly charged with the additional offenses of obstruction of tax collection under 26 U.S.C. §7212(a) and concealment of property subject to levy under 26 U.S.C. §7206(4). There were no charges that Petitioner failed to accurately report all of his income during the time covered by the Indictment.

[2] The government introduced into evidence all of Hatchett's income tax returns, filed prior to and during the time covered by the Indictment, audit summaries, reports relating to audits of Hatchett's taxes for ten consecutive years beginning in 1972, memoranda disallowing deductions and assessing substantially increased taxes as a result of each audit, letters from Hatchett to the IRS, copies of all Hatchett's banking records including cashier's checks issued by him or to him, financial statements filed by him, monthly bank statements, annual statements of his tax liability, interest and penalties, a list of all property claimed by Hatchett on his tax returns, reports regarding seizures and the sale of property, including vehicles and real estate in which petitioner had or was alleged to have had an interest, and many related documents including surveillance reports. The government called many witnesses who testified about these and other issues. Thus, the testimony

(Continued on following page)

petitioner made large sums of money during the years covered by the indictment. To prove its felony charges, the government sought unsuccessfully to establish that petitioner used these funds to purchase items including car wash equipment, and a foster care home, in the names of other people; namely his father and his wife.[3]

After the government's case was concluded, petitioner commenced his defense against the charges. Petitioner's only defense to the misdemeanor charges was

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of the government witnesses regarding the history of petitioner's contacts with the IRS was voluminously documented and testified about in great detail. This evidence, offered by the government in its case-in-chief provided the jury with a complete picture of Hatchett's dealings with the government in regard to his taxes.

[3] The majority opinion of the Court of Appeals described petitioner's activities as follows: "In May 1983, Hatchett bought $113,744.20 worth of car wash equipment for a business called Sparkle Carwash, which *he held* in the name of his elder father. In 1985, *Hatchett purchased* a foster care home *in his wife's name* for $100,000.00 cash". App. 4 It was precisely upon those claims that the government based two counts of the felony charges against Petitioner. The proofs, however, showed that the car wash equipment purchased by petitioner was for his elderly father who had been operating the car wash for over 15 years. The proofs further disclosed that Hatchett's wife paid $100,000.00 *down* on a contract to purchase (from a combination of funds that she personally borrowed and had earned and paid taxes on) a foster care business that cost $650,000.00. The jury accordingly acquitted Hatchett and his wife on the felony charges upon which those transactions were based. A further integral part of the felony charges was the claim that a Rolls Royce vehicle that was purchased personally by Mrs. Hatchett with funds that she borrowed from a bank in reality belonged to petitioner.

that his conduct was inspired by his good faith reliance upon the advice of his attorney.

Petitioner called Franklin Gettleson, an attorney and CPA of twenty years experience, to testify about: i) the facts disclosed by Hatchett to him regarding his tax problem; ii) the research conducted by Gettleson preparatory to rendering an opinion and giving advice; and iii) the advice Gettleson gave petitioner. Gettleson testified that he had known petitioner for a long time and that petitioner consulted with him in 1979-80 to obtain advice as to how he could best resolve his then outstanding dispute with the IRS. App. 60-62 Gettleson testified that he knew that Hatchett had been involved in an ongoing dispute with the IRS and that he had been assessed substantial amounts of additional taxes as a result of "incessant" audits. App. 65

The trial court sustained the government's objection to Attorney Gettleson's testimony regarding the result of research he had conducted supporting the propriety of the advice he gave Hatchett. Gettleson nevertheless testified that he informed Hatchett that it was legally appropriate under the circumstances for him to withhold payment to the IRS. App. 70-71 Moreover, *he specifically advised Hatchett to file income tax returns but not to make any further payments to the IRS until they reduced their claims to judgment or until the IRS offered a reasonable installment payment plan on an agreed amount.* App. 71-72 Gettleson explained that this approach would be quite expensive since substantial penalties and interest would be imposed, however, he told Hatchett that the expense would be ameliorated since the interest was 100% deductible. App. 66 Mr. Gettleson believed that this course was

best calculated to resolve the dispute because the IRS would eventually reduce its claim to judgment, and a court would be more reasonable than the IRS in working out a payment arrangement on whatever sums were judicially determined to be owed. App. 72 Because Gettleson recommended a course of conduct that was to be followed until the problem was resolved, he viewed the advice prospectively, to apply to tax years 1980 and forward.[4] Moreover, Gettleson testified that as recently as one or two years prior to trial, he met with Hatchett and advised him that because of changes in the tax law, interest on the obligation to the IRS would no longer be deductible. App. 69

Before Gettleson testified as a defense witness, the government had already presented its case in chief, which consisted of extensive documentary and testimonial evidence concerning many of the matters which petitioner had disclosed to Gettleson prior to seeking his advice. (*See* n.2. *supra*). When Gettleson was asked about the disclosures petitioner made when he sought legal advice the following colloquy occurred:

> Q. And in consulting with you, did he advise you as to any of the specifics regarding the

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[4] Pursuant to the advice given to him by Attorney Gettleson, commencing in 1980 through 1986, petitioner sent numerous letters to the IRS including a letter of March 17, 1983 in which he again advised that he was continuing to withhold payment "pursuant to advise of my counsel and accountant." Petitioner also appealed personally to the District Director for the region including a letter of August 14, 1984 wherein he reiterated his previous request that the IRS reduce this claim to judgment and protested the tactics being employed by the IRS collection agents. App. 78

tax liability, for example, the amount owed and how the amount occurred?

A. Yes, he did.

Q. Could you tell the members of the jury *what he told you* in those conversations in early . . .

A. Objection, Your Honor, hearsay and relevance. App. 62

Defense counsel appealed to the court to admit the testimony *for the express purpose of satisfying the full disclosure requirement* of the advice of counsel defense:

Mrs. Morey: Your Honor, it is hearsay, however, with respect to the advice of counsel defense, the jury is entitled to determine whether pertinent facts were properly disclosed to the attorney and whether he relied upon those disclosures in giving the advice, therefore, it is a necessary part of the testimony in order for the jury to evaluate it.

* * *

Mrs. Morey: I submit *we are not offering it for the truth of the matter asserted but under the Davenport decision with which the jury must make determinations as to whether the person seeking the legal advice made appropriate disclosures.* App. 63-64

The trial court sustained the objection on the grounds of hearsay even though the testimony was offered only as evidence of disclosures made to Gettleson, and *not* offered to prove the truth of those disclosures. App. 64 Having been denied the opportunity to identify the disclosures made by petitioner, the Court nonetheless

permitted the government to cross-examine Mr. Gettleson about the disclosures Hatchett did *not* make.[5] App. 75-76

At the close of evidence, the government asked the Court not to give an advice of counsel instruction. The defense, on the other hand, requested the instruction but asked the Court to delete the full disclosure requirement from the instruction because it had not been permitted to develop the disclosure issue. App. 84 The government then agreed that if the instruction was to be given, the full disclosure requirement should be deleted. App. 85 Notwithstanding the government's acquiescence to the defense request, the Court refused to delete reference to full disclosure because, "I think full disclosure is part of it . . . " Accordingly, the following jury instruction was given:

> If you find that defendant consulted with a competent attorney in order to ascertain the legality of the matters here involved, *and if you also find that the defendant in good faith supplied that attorney with a complete and accurate report of all the material facts relating to the defendant's inquiry,* and if you also find that thereafter the defendant acted strictly in accordance with the advice of his attorney, you may find that the defendant did not act willfully in the violations charged. But on the other hand, *if you find that the defendant failed to supply the attorney with a complete and accurate report of all the material facts or that* defendant failed to act strictly in accordance

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[5] For example, the government asked Gettleson whether he knew of an installment payment agreement that petitioner had with the IRS in the year 1978 that was apparently aborted because one of petitioner's checks was returned by the bank, NSF.

> with the advice of his attorney, then it is no defense to the offenses charged that the defendant consulted with and received an opinion from an attorney.

App. 123 (Emphasis added). In light of the trial court's refusal to permit Attorney Gettleson to testify about disclosures made to him by petitioner, the jury had no choice but to find the petitioner guilty since the court's ruling made it impossible for petitioner to satisfy the full disclosure requirement of the advice of counsel defense.

After a trial lasting over a month, the jury acquitted petitioner and his wife of all felony violations, but convicted petitioner of the misdemeanor willful failure to pay charges for 1982, 1983, 1984 and 1986. Petitioner's wife was entirely exonerated.

At the time of sentencing, the Court expressed the following view before imposing sentence, "[t]he actions here for which the defendant was convicted was . . . a conscious, deliberate, knowing choice".[6] App. 88 The Court thereafter sentenced petitioner to three, one (1) year terms of incarceration to run consecutively on the 1982, 1983 and 1984 misdemeanor convictions, and placed petitioner on probation for a period of five (5) years with respect to the 1986 misdemeanor conviction. As a condition of probation, petitioner was ordered to make "restitution" by paying "all back taxes", and the Court

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[6] The irony of the court's presentence commentary is that the essence of petitioner's defense was that he "consciously" and "deliberately" followed the advice of his attorney, which but for the Court's erroneous ruling, was a complete defense to the charge.

imposed a $25,000.00 committed fine on each count, totalling $100,000.00.[7] App. 88-89

After sentencing, defendant asked the District Court to grant him bond pending appeal. In making this request the defense argued that substantial issues would be raised on appeal, including the Court's failure to permit Attorney Gettleson to testify about the disclosures made by Hatchett. The defense directed the Court's attention to the case of *United States v. Eisenstein*, 731 F. 2d 1540 (11th Cir. 1984), which held that in the context of the full disclosure requirement of the advice of counsel defense the attorney's testimony about disclosures made by the defendant were not hearsay because such statements were not offered for the truth, but merely to show that disclosure had been made, and whether hearsay or not, such testimony is "always admissible."

The District Court denied petitioner's request for a bond pending appeal, reasoning that *Eisenstein* did not raise a significant issue on appeal. App. 37 The District Court distinguished *Eisenstein* on the grounds that it involved a co-defendant who testified about statements made to his counsel.[8] Accordingly, the Court reasoned:

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[7] A non-guideline sentence requiring petitioner to serve (30) months in prison was imposed by the Court, although the guidelines were invoked by petitioner's counsel based upon a claim that the offenses were continuing. Had the guidelines been applied as requested by petitioner, the Court would have been precluded from "stacking" by giving consecutive sentences.

[8] The District Court further concluded that "[t]he relevance of the facts disclosed could only have been determined

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> The distinguishing factor between *Eisenstein* and the case at bar is that in *Eisenstein* the out-of-court statement was merely offered to corroborate that disclosure was made . . . Although Gettleson's testimony may have been admissible for the limited purpose of showing defendant made a disclosure, it was not admissible to prove the facts constituting the disclosure. This Court finds that the statements offered by Attorney Gettleson, unlike those offered in *Eisenstein*, were necessarily offered not only to prove that disclosure was made, but also to prove the truth of the out-of-court statements which defendant sought to solicit from attorney Gettleson. Therefore, the testimony in question was inadmissible hearsay,. . . .

App. 41

On appeal,[9] petitioner attempted to demonstrate that the basis upon which the District Court distinguished

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had the jury considered as truthful the out-of-court statements which attorney Gettleson was asked to recite." App. 41 The error in the court's reasoning is obvious insofar as, generally, the court makes relevancy determinations while the jury makes findings of credibility. Clearly, there is no cognizable relationship between the court's determination of relevancy and the jury's assessment of the truthfulness of the disclosures. Thus, the court's suggestion that it could determine the relevancy of the disclosures *only* if the jury considered them as truthful is totally lacking in logic.

[9] After the trial court denied the petitioner's request for bond, the petitioner filed a Notice of Appeal on June 8, 1989 and an Emergency Motion for Bond Pending Appeal and Stay of Execution of Sentence on June 12, 1989. In its Emergency Motion, Petitioner argued, *inter alia*, that *Eisenstein* raised a substantial issue on appeal. The motion was granted by the Court of Appeals on June 15, 1989.

Eisenstein was specious. Petitioner pointed out that nothing in *Eisenstein* remotely suggested that the defendant/client must testify as to disclosures made by him as a prerequisite for the admissibility of such testimony by the attorney. Petitioner argued that *Eisenstein* held that testimony by the attorney about disclosures made by the defendant simply was not hearsay because it was not offered for its truth.

Petitioner unsuccessfully argued on appeal that if the testimony of the attorney regarding disclosures made by the petitioner had been admitted, the jury was required to test the fullness and accuracy of the disclosures against the entire record. Petitioner further claimed that as a consequence of the trial court's ruling, the advice of counsel defense became *impossible to prove,* because the same hearsay rule would have prevented petitioner, as well as his attorney, from relating out-of-court declarations made by him to his attorney. App. 101

The Sixth Circuit Court of Appeals[10] addressed petitioner's contention that the exclusion of the Gettleson testimony *"completely deprived Hatchett of his right to make out a defense"*, by simply rejecting this claim by distinguishing the *Eisenstein* case as follows:

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[10] The panel consisted of the Honorable Nathaniel R. Jones, and the Honorable Danny L. Boggs, both active members of the United States Court of Appeals for the Sixth Circuit. The Honorable Julia Smith Gibbons, United States District Court Judge for the Western District of Tennessee sat by designation. Judge Boggs wrote the majority opinion and Judge Jones wrote a dissenting opinion. App. 1

> This argument collapses under the weight of its own logic, however, because the fact that Gettleson, not Hatchett, was the vehicle for getting the statements before the jury is what distinguishes *Eisenstein*. In *Eisenstein*, the Court admitted the testimony because it was not offered to prove the truth of the matter asserted. A co-defendant had already related the matter disclosed, and the lawyer's recounting of the disclosures was not needed to prove the truth. By contrast, the jury in this case would have been induced to accept the truth of the matters disclosed by Hatchett when Gettleson testified to them.

United States v. Hatchett, 918 F. 2d at 638 n.8., App. 14

The majority opinion never addressed petitioner's contention that the truth of the disclosures had to be evaluated by contrasting disclosures against the entire record. Judge Jones wrote a dissent in which he opined that: i) the Gettleson testimony was not hearsay because it was not offered for its truth, ii) the truth of the disclosures had to be evaluated on the basis of the entire record, and iii) the "testimony went to the heart of Hatchett's defense and therefore, to the heart of the fairness of the trial." 918 F. 2d at 645 (Jones, J. dissenting). App. 33

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

Summary of Reasons for Granting Petition for Writ of Certiorari

Certiorari should be granted because this case presents important questions concerning a conflict between the Federal Rules of Evidence, (Hearsay) and the Fifth

and Sixth Amendments of the United States Constitution. Moreover, certiorari should be granted to resolve the irreconcilable conflict between the law as articulated by the Sixth Circuit Court of Appeals and other federal and state appellate courts, including the Eleventh Circuit, the Ninth Circuit, the Court of Appeals for the State of Illinois, the Court of Appeals for the State of Arizona, and the Supreme Court of Maine, all of which are the progeny of this Court's decision in *Williamson v. United States*, 207 U.S. 425 (1908).

This Court should also grant certiorari because the manner in which the lower courts applied the hearsay rule effectively abolishes the advice of counsel defense by making it impossible for *any* defendant to prove this defense. If the District Court, as affirmed by the Court of Appeals, erroneously excluded evidence by Attorney Gettleson concerning disclosures made to him by Hatchett on the grounds that such testimony was hearsay, petitioner was denied due process of law because he was prevented from presenting evidence that was fundamental to a fair trial and crucial to his *only* defense. On the other hand, if the evidence was properly excluded, the Federal Rules of Evidence have been construed in a manner which places them in conflict with the due process clauses of the Constitution by making it impossible for any defendant to ever successfully assert an advice of counsel defense due to the prohibition against introducing evidence to show that full disclosure had been made.

I. The Decision Of The Sixth Circuit Has Applied The Hearsay Rule In A Manner Which Abrogates The Advice of Counsel Defense In Violation Of Petitioner's Due Process Rights

Although the right to present evidence is fundamental, evidentiary error is not necessarily tantamount to

constitutional error. *Crane v. Kentucky*, 476 U.S. 683, 689 (1986). As this Court recognized in *Crane*, however, the right to present a defense in a criminal trial lies at the heart of the due process rights guaranteed by the Constitution:

> Whether rooted directly in the due process clause of the Fourteenth Amendment[11] *Chambers v. Mississippi*, [410 U.S. 284, 302 (1973)] or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L. Ed 2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 39 L Ed 2d 347 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S., at 485, 104 S.Ct., at 2532, Ct.; cf. *Strickland v. Washington*, 466 U.S. 668, 684-685, 104, 2052, 2063, 80 L Ed 2d 674 (1984) ("The Constitution guarantees a fair trial through the Due Process clauses, but it defines the basic elements of a fair trial largely through several provisions of the Sixth Amendment").

Id. at 690 (1986) (citations in original). *Accord Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987); *Feretta v. California*, 922 U.S. 806, 818 (1974); *In re Oliver*, 333 U.S. 257 (1948) ("a person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, at a minimum, a right to examine the witnesses against him, *to offer testimony*, and to be represented by counsel" 333 U.S. at 273)

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[11] Since this is a federal criminal proceeding, Petitioner's Due Process rights arise from the Due Process clause of the Fifth Amendment.

(emphasis added). Thus, evidentiary error which deprives a defendant of the ability to present a meaningful defense is a constitutional deprivation.

The majority opinion of the Court of Appeals appropriately described and delineated the fundamental constitutional issue involved in this petition when it observed as follows:

> "Hatchett thus contends that the exclusion of this testimony completely deprived Hatchett of his right to make out a defense."

United States v. Hatchett, 918 F. 2d at 638, App. 15 Moreover, the dissent determined that the exclusion of the testimony deprived petitioner of a fair trial. *Id.* at 645 (Jones, J. dissenting) App. 33

The misapplication of the hearsay rule in this case deprived petitioner of a fair trial since it prevented him from presenting evidence critical to his only defense – advice of counsel. The District Court emphasized the importance of the disclosure requirement by insisting upon giving the full disclosure jury instruction, despite the government's willingness to withdraw this element of the instruction.[12] By giving this instruction the court stripped petitioner of the only means by which he could prove compliance with the full disclosure requirement. The District Court and the Sixth Circuit assumed that even if Gettleson was precluded from testifying about

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[12] The government's willingness to delete the reference to the full disclosure requirement from the jury instructions is tantamount to an admission that the exclusion of the Gettleson testimony on grounds of hearsay was error, just as the government conceded in *Eisenstein*.

the disclosures made by petitioner, petitioner could nonetheless satisfy the disclosure element of the defense by taking the stand and himself testifying about the disclosures. However, as Judge Jones pointed out in his dissent:

> . . . The majority suggests that if Hatchett had testified, or put on other evidence that went to the truth of the disclosure he made to Gettleson, then Gettleson's statements that disclosure was made would only go to the fact of disclosure. But this argument is circular. Presumably, if the defense put on Hatchett to testify as to his conversations with Gettleson, this testimony would have been objected to as hearsay on the same grounds as Gettleson's. The defense would have been required to corroborate Hatchett's testimony with other evidence as to the truth of his disclosure statements. The logical witness to corroborate Hatchett would be Gettleson. But then, that is where we started.

United States v. Hatchett, 918 F. 2d at 645 (Jones, J. dissenting) App. 32

The dissent illustrates that the evidence of disclosure was separate and distinct from the issue of the completeness and truthfulness of the disclosures. Once evidence of disclosures was placed in the record, the jury had to determine from the entire record whether the disclosures were complete, full and accurate. *United States v. Hatchett*, 918 F.2d at 645, App. 31-32; *Accord Salem v. Kamberos*, 206 Ill. App. 686, 565 N.E.2d 6, 11-12 (1990) ("the communications with the attorney must be proved, and then it was for the jury to say whether the statement was true and full") *Id.*

The Sixth Circuit Court's analysis of the hearsay rule avoidably construes the rule in a manner that would prevent both the attorney and the client from testifying about disclosures[13] made by the client. This ruling makes it impossible to satisfy the disclosure element of the advice of counsel defense because proof of the disclosures ***could only be elicited from the attorney or the client***. Thus, the practical effect of the ruling is to abrogate the advice of counsel defense.

This Court has made clear that the application of evidentiary and procedural rules may not be allowed to frustrate legitimate efforts to introduce exculpatory testimony. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14, 23, (1967); *Crane v. Kentucky, supra; Chambers, Washington,* and *Crane* emphasize that state evidentiary rules must be interpreted with deference to the constitutional principles of due process and the right to present a defense. Federal evidentiary questions are subject to precisely the same analysis. This Court, in *Washington v. Texas, supra,* explained that an

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[13] Fed. R. Evid. 801 provides:

> Hearsay. Hearsay is a statement other than the one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted.

The rule makes no distinction as to whether the out-of-court statement was made by a defendant or the person who is testifying. Consequently, to the extent the Court of Appeals construed Gettleson's testimony as hearsay because it was offered for its truth, testimony by Hatchett concerning the disclosures would stand on the same footing as an out-of-court statement offered for its truth and would be equally objectionable as hearsay.

accused's right to present evidence bearing on crucial questions of fact serves the ultimate goal of reliable verdicts:

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, *the right to present the defendant's version of the facts* as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of Due Process of law.

388 U.S. at 19. (emphasis added).

It is beyond challenge that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. at 302. The application of evidentiary principles in a manner which conceals from the jurors operative facts supporting a defense is error of constitutional magnitude.

In contrast to the treatment of the matter by the District Court and the Sixth Circuit, the evidentiary question in this case was rather straightforward. Fed. R. Evid. 105 recognizes that evidence may be admissible for one purpose and inadmissible for another. In accordance with this rule, trial courts routinely "restrict the evidence to its proper scope and instruct the jury accordingly." Here, statements petitioner made to his attorney were admissible and necessary to establish the disclosures. The Court's apprehension that the jury might accept the

statements as proof of the matter in question, could easily have been addressed through a cautionary instruction.[14]

Clearly the jury had available to it voluminous evidence from the government's case to resolve questions regarding the accuracy of the disclosures. The District Court, nevertheless, chose to exclude evidence which comprised the essence of the defense under the mistaken belief that its singular function was as classic hearsay. As in *Chambers:*

> That testimony also was critical to (the) defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

410 U.S.at 302. By mechanistically applying the hearsay rule, the instant Court ignored a second legitimate and critical function of the testimony. Exclusion of this evidence pinioned the defense.

The Sixth Circuit rationalized that regardless of the question of admissibility, other facts in support of petitioner's defense found their way into the evidence before the jurors. It is clear that both the Constitution and the success of petitioner's defense requires more. There was

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[14] The District Court itself recognized that "Gettleson's testimony was admissible for the limited purpose of showing defendant made a disclosure . . . ". However, having conceded its admissibility, the court nonetheless prevented petitioner from presenting *any* evidence on the disclosure issue. To the extent the evidence was admissible for one purpose, but not another, the proper practice is to admit the testimony with a limiting instruction. *United States v. Hatchett,* 918 F.2d at 645, App. 32

no benefit to petitioner for the jurors to conclude from the record, by happenstance, that he had, in fact, made "several" disclosures, when the Court gave a jury instruction in which it told the jury that in order to acquit petitioner, they must find he made a *full* and *complete* disclosure of *all material facts* to the attorney. Inherent in the constitutional notion of an opportunity to present a defense is the requirement that a defendant be offered the opportunity to present a *meaningful defense*; not just "some" defense. Clearly, proof by petitioner of anything less than a full and complete disclosure to his attorney of all material facts was, by the very definition of this element of the advice of counsel defense, futile.

In *Chambers*, the defense sought to introduce evidence that a witness, McDonald, had confessed to the crime for which the defendant was charged. The trial court admitted the confession to impeach McDonald's subsequent repudiation of his confession. The trial court, however, refused to allow the defense to cross-examine McDonald as an adverse witness or to admit McDonald's self-incriminating remarks made to witnesses at the scene. Despite the admission of substantial evidence to support the defense, this Court held that the defendant was "effectively prevented from exploring the circumstances . . . " 410 U.S. at 297. Thus, the *Chambers* Court concluded that the defendant had been denied the right to confront witnesses and to present a defense pursuant to his Sixth Amendment rights. *Accord Green v. Georgia*, 442 U.S. 95 (1979) (Exclusion of testimony as to confession by co-defendant charged with same crime, because Georgia statute did not recognize declaration against penal interest as exception to hearsay rule, deprived petitioner of fair trial and due process where prosecution

relied on same testimony to convict individual who made confession).

Moreover, in contexts other than those involving the hearsay rule, this Court has found a violation of due process where a defendant has been denied a fair trial based on the exclusion of evidence crucial to a defense. *See*, e.g., *Rock v. Arkansas, supra,* (Arkansas *per se* rule against use of hypnotically refreshed testimony violation of due process); *Crane v. Kentucky, supra,* (after introduction of confession defense prohibition from exploring circumstances in which confession obtained in violation of due process). *See also, Boykins v. Wainwright,* 737 F. 2d 1539, 1543-47 (11th Cir. 1989) (exclusion of testimony of treating psychiatrist where defense is insanity constitutes a violation of due process).

The exclusion of the Gettleson testimony based upon a misconstruction of the hearsay rule violated due process because it deprived petitioner of his right to present a meaningful defense by precluding him from offering evidence that was the *sine qua non* of his defense. As in *Chambers, supra,* and *Green, supra,* the denial of petitioner's due process rights based upon a misapplication of the hearsay rule on an individual basis would be sufficient to warrant this Court's grant of certiorari. However, the due process issues presented by this case, in contrast to *Chambers* and *Green,* extend far beyond the individual constitutional violation incurred by petitioner.

The essence of the holding of the lower courts is that unless a defendant is willing to waive his Fifth Amendment privilege against self-incrimination and testify, he must eschew reliance on the advice of counsel as a defense. The analysis of the lower courts proceeds on the

assumption that the petitioner could still make out the advice of counsel defense by taking the stand himself. The defendant, however, would be in no better position to testify to the disclosures than would be the attorney. Consequently, the impact of the ruling is to void the advice of counsel defense *sub silentio*.

Accordingly, the core due process issue is whether defendants charged with willful failure to pay taxes, or any other specific intent crime, may avail themselves of the advice of counsel defense in order to negate the element of willfulness. As Justice Scalia recently pointed out in his concurring opinion in *Cheek v. U.S.*, ___ U.S. ___, 111 S. Ct. 604 (1991), the term "willfully", as used in the tax statutes "refers to consciousness of both the act and its illegality." *Id.* at 614.

Since the very essence of the advice of counsel defense pertains to an individual's consciousness of the illegality of his or her act, an evidentiary precedent which eviscerates the advice of counsel defense raises critical questions as to how criminal liability may be imposed in the context of the federal tax statutes, or other specific intent crimes, consistent with the mandate of the due process clause.

II. The Decision Of The Sixth Circuit Court Of Appeals Conflicts With Every Federal And State Appellate Decision Which Has Considered The Issue Of Whether An Attorney's Testimony About His Client's Disclosures Is Hearsay

United States v. Hatchett, supra, is the only reported case which has held that testimony by an attorney concerning disclosures made by his client in the course of

seeking legal advice is inadmissible hearsay. The holding is contrary to the reasoning and results of every state and federal decision which has addressed the issue. *United States v. Eisenstein, supra; United States v. McLennan*, 563 F. 2d 943 (9th Cir. 1977), *cert. denied*, 435 U.S. 969, 985 (1978); *Matter of Patterson*, 70 B.R. 124, 131 (W.D. Mo. 1986); *Salem v. Kamberos*, 206 Ill. App. 3d 686, 565 N.E.2d 6, 11-13 (1990); *Morin v. Mineau*, 112 Me. 471, 473, 92 A. 527, 528 (1917); *Tate v. Connel*, 3 Ariz App. 534, 416 P.2d 213 (1979).

In its opinion, the Sixth Circuit Court of Appeals did not cite any authority which affirmatively supported its view that the Gettleson testimony was hearsay. Rather, it sought merely to distinguish *Eisenstein* on the grounds that in *Eisenstein*, a codefendant testified. The four corners of the written opinion make clear that the purported distinction cannot withstand scrutiny. An examination of the record in *Eisenstein* further demonstrates that the purported distinction is entirely specious. In short, *Eisenstein* stands in stark conflict with *Hatchett*.

In *Eisenstein v. United States, supra*, defendants Ghitis and Eisenstein, joint operators of a currency exchange, were charged with the willful failure to file currency transaction reports as required by federal statute. Ghitis operated out of Colombia, South America, and Eisenstein out of Miami, Florida. Their sole defense to the charges was reliance on the advice of counsel. As in the present case, they called their lawyer to testify about the disclosures made by the defendants in seeking legal advice. However, when asked what Ghitis told the lawyer, the trial court sustained the government's hearsay objection.

On appeal, the Eleventh Circuit noted as follows in reversing the conviction:

> The government now concedes that the trial court erred by sustaining the prosecutors objections to defense counsel's questions about Ghitis' disclosure to his attorney. The lawyers testimony was not offered as proof of the matter – i.e., that Ghitis and Eisenstein operated a currency exchange – but as evidence fully disclosed the nature of his business to his attorney. The testimony was admissible to show the attorney's knowledge and to show Ghitis' compliance with the full disclosure requirement of the advice of counsel defense.

731 F. 2d at 1545. The Eleventh Circuit rejected the harmless error argument, noting that advice of counsel was defendant's only defense. An examination of the record in *Eisenstein* further demonstrates that the purported distinction is based upon an entirely false premise.[15]

In *United States v. McLennan*, 563 F.2d 943 (9th Cir. 1977) *cert. denied*, 435 U.S. 969 (1978), the government sought to negate defendant's reliance on advice of counsel defense by showing that when they had advised their former attorney of their plans, he responded by stating:

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[15] Counsel for petitioner advised the Court of Appeals, on rehearing, that he had obtained the entire trial record of the *Eisenstein* case. The trial record reveals that in the government's case in chief, it merely offered selected portions of deposition testimony of defendants Ghitis and Eisenstein given during a civil forfeiture proceeding. Other than the deposition testimony of these defendants, the record indicates that neither defendant had testified before the attorney, Joquin Fernandez, was called to testify about the contents of disclosures made to him by either defendant. Nowhere in the deposition testimony of either defendant were there any assertions regarding disclosures made by them to their attorney. App. 161 The record from *Eisenstein* will be produced in greater detail if the Court so desires.

"For Christ's sake, I told you that was illegal." 563 F. 2d at 946. On appeal, defendants contended the testimony should have been excluded as hearsay because it was an out-of-court statement offered for its truth. In rejecting this contention, the Ninth Circuit noted:

> . . . [T]he statement was not offered or admitted to provide the truth of what Burnett said – that defendants' actions were illegal or that in the past he had told them "that is illegal" – but simply to show that the statement concerning illegality had been made. When the defense is advice of counsel, the advice given, whether correct or not, and whether the recitals in it are true or not, is always admissible. . . .

Id. at 946.

State appellate courts have universally ruled that testimony by an attorney concerning disclosures made by his client are not hearsay. In *Salem v. Kamberos*, 206 Ill. App. 686, 565 N.E.2d 6 (1990), the trial court excluded the defendant's testimony concerning disclosures made by his client as hearsay. The defendant had testified but made no reference to her discussion with her attorney. In reversing, the Illinois Court of Appeals held that:

> . . . communications between the defendant in a malicious prosecution case, and the attorney who advised the criminal prosecution are admitted, not as exceptions to the hearsay rule, but *because the words communicated are not offered for the truth of the matter*, but rather to establish the good faith of the person bringing the prior criminal action.

Id. at 11 (Emphasis supplied). As petitioner urged in this case, the *Salem* Court held that the truth of the disclosures were to be evaluated on the basis of the entire record. *Id.*

Moreover, the Court specifically addressed the argument that the defendant did not testify about the disclosures:

> We do not find persuasive the plaintiff's argument that no error occurred because the defendant herself did not testify as to the conversation . . . If she had established the conversation through her testimony alone, (*assuming she would have been permitted to do so*), we feel certain that the plaintiff's attorney would have called the jury's attention to the absence of the testimony of her potentially corroborating attorney.

Id. at 12[16] (Emphasis added). The Court, citing the Maine Supreme Court case of *Morin v. Mineau*, 112 Me. 471, 92 A. 527 (1914), emphasized that "a statement made by the defendant to his counsel . . . are not only admissible but 'indispensable' ".

In addition to the Illinois Court of Appeals and the Maine Supreme Court, the Arizona Court of Appeals has also squarely rejected the reasoning employed by the lower court in this case holding that communications between a client and counsel, when seeking legal advice, are not hearsay when offered to show good faith in the

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[16] The *Salem* Court recognized, as Judge Jones recognized in his dissent, that even if the defendant attempted to testify to these disclosures, such testimony would clearly have been inadmissable under the hearsay rule.

Although it may not be self-evident under Fed. R. Evid. 801(d)(l)(b), a *prior statement of the witness* is hearsay, unless a foundation is laid by the opposing party who makes a claim of prior inconsistent statement. It is only under such circumstances that prior statements of a witness become admissible as non-hearsay, self-serving objections notwithstanding.

context of the advice of counsel defense. *Tate v. Connel*, 3 Ariz. App. 534, 416 P.2d 313 (1966).

As demonstrated above, the decision in *United States v. Hatchett, supra,* is inconsistent with every federal and state court which has addressed the issue. This evidentiary error has not only resulted in the denial of a fair trial and deprivation of petitioner's due process rights, but more importantly, it threatens the due process rights of any defendant charged with a specific intent crime from ever being able to assert the advice of counsel defense to negate willfulness. The conflict created by the Sixth Circuit decision in an area of constitutional significance makes this issue ripe for review.

III. The Sentence As Affirmed By The Sixth Circuit Court of Appeals Places It In Conflict With Four Other Circuits Which Have Analyzed Restitution Orders In Tax Cases Under 18 U.S.C. §3651

The Sixth Circuit opinion determined that the Judgment and Commitment Order was not an order of restitution entered pursuant to 18 U.S.C. §3651, however, the opinion fails to state the authority upon which the trial court's sentence was ordered. Moreover, the Sixth Circuit decision is in conflict with other circuits which have construed sentences requiring the payment of "all back taxes" as a condition of probation, including tax years for which petitioner was acquitted.

Appellant was sentenced to a twelve month term of imprisonment each on three counts and, sentence was suspended and appellant was placed on probation for a period of five years on the fourth count. As a condition of

probation, the Court ordered appellant to make restitution by paying "all back taxes". App. 91

The Federal Probation Act, 18 U.S.C. §3651, authorizes a trial court to order a defendant to make restitution as a condition of probation. This statute permits a trial court to suspend the imposition or execution of sentence, place the defendant on probation and require the defendant to make restitution "for actual damages or loss caused by the offense for which conviction was had" as a condition of probation. *Fiore v. United States*, 696 F. 2d 205, 207 (2nd Cir. 1982). Insofar as the trial court's order in this case suspended the imposition of sentence and required appellant to pay monies as a special condition of his probation, the authority for the court's action can only emanate from 18 U.S.C. §3651.

The Sixth Circuit Court of Appeals reasoned that an "order [to pay back taxes] need not be limited to amounts owed for the years for which Hatchett was convicted." This analysis, however, is clearly contrary to *United States v. Green*, 735 F. 2d 1203, 1205 (9th Cir. 1984), *cert. denied*, 110 S.Ct. 568 (1989); *United States v. Johnson* 700 F. 2d 699, 701 (11th Cir. 1983); *United States v. McDonough*, 703 F. 2d 19, 24 (7th Cir. 1983); *United States v. Taylor*, 305 F. 2d 183, 187 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962). These decisions consistently hold that in "criminal tax cases, [a trial] court may order restitution *only* of back taxes for the years involved in the conviction." *United States v. Green*, 735 F. 2d at 1205 (emphasis supplied). Hence, the Sixth Circuit opinion is in clear conflict with four other circuit courts which have construed trial courts as having limited jurisdiction to order repayment of taxes that are the subject of counts for which the defendant has been

acquitted. Thus, the Sixth Circuit contravenes the prevailing case law that exists in the circuits as it relates to this issue. Accordingly, certiorari should be granted to resolve the conflict in the circuits regarding the construction of 18 U.S.C. §3651 and the authority conferred upon trial courts.

CONCLUSION

The District Court's bias against petitioner, as evidenced by an excessive sentence which far exceeds anything current guidelines would authorize, caused it to depart from fundamental concepts inherent in the application of the hearsay rule. The fact that the Sixth Circuit has adopted the District Court's reasoning creates a precedent that will prevent litigants in both criminal and civil trials from introducing critical, relevant, admissible evidence. Thus, the ruling not only deprives petitioner of his due process rights, but will also impact any litigant's ability to present or defend a case.

Since the ruling is in conflict with all federal and state decisions which have addressed the issue, certiorari should be granted to halt any further perversion of the hearsay rule or infringement upon a litigant's due process rights.

Respectfully submitted,

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Elbert L. Hatchett,
Defendant-Appellant

No. 89-1679.

United States Court of Appeals,
Sixth Circuit.

Cause Argued Aug. 14, 1990.

Decided Nov. 7, 1990.

Kathleen Moro Nesi, Asst. U.S. Atty. (argued), Office of the U.S. Atty., Detroit, Mich., for plaintiff-appellee.

William T. Coleman, III, Phyllis Golden Morey (argued), Pepper, Hamilton & Scheetz, Detroit, Mich., for defendant-appellant.

Before JONES and BOGGS, Circuit Judges, and GIBBONS,* District Judge.

BOGGS, Circuit Judge.

Elbert L. Hatchett appeals his conviction on four misdemeanor counts of willful failure to pay federal income taxes for tax years 1981, 1983, 1984, and 1986, in violation of 26 U.S.C. § 7203. On October 20, 1988, Hatchett was charged in an eight-count indictment with one count of tax evasion, in violation of 26 U.S.C. § 7201; one count of obstruction of tax collection, in violation of 26

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* The Honorable Julia Smith Gibbons, United States District Judge for the Western District of Tennessee, sitting by designation.

U.S.C. § 7212(a); one count of concealment of property subject to levy, in violation of 26 U.S.C. § 7206(4); and five counts of willful failure to pay income taxes. After a month-long jury trial in February and March 1989, Hatchett was acquitted on the three felony counts and one misdemeanor count (failure to pay tax for 1985). The jury returned a guilty verdict on the other four counts, for which the court sentenced Hatchett to three consecutive one-year sentences. Hatchett also received one suspended sentence and was placed on five years' probation. Hatchett was also fined $100,00 ($25,000 on each count) and ordered to pay "all back taxes" as a condition of probation.

I

Hatchett is an attorney in the Detroit area who concededly began to fall behind in his tax payments in the 1970s. Audits conducted in the late 1970s by the Internal Revenue Service (IRS) revealed that Hatchett owed back taxes for tax years 1973-1977 in the amount of $107,454.14. On August 23, 1978, he entered into an installment agreement with the IRS, whereby he would pay the government $750 per week – $500 for his 1978 estimated tax payments and $250 for his delinquent taxes. From 1979 through 1986 (with the exception of tax year 1985), Hatchett submitted tax returns without any accompanying payment at all; he also failed to make any estimated tax payments during those years.

Hatchett claims that he consulted with an attorney, Frank Gettleson, on several occasions in 1979 and in 1986 in order to consider different ways of handling his tax

problems. He claims that Gettleson advised him to file returns that were then overdue but to withhold payment until he was able to negotiate with the IRS a consolidated payment schedule for all taxes. Hatchett thereafter filed a timely return for tax year 1979 on April 14, 1980, but without accompanying payment. He filed a late return for tax year 1980 on April 14, 1982, the same day he filed his 1981 return. Neither the 1980 nor the 1981 return included payment.

On August 26, 1980, Hatchett wrote to the IRS to inform it that he wished to make a lump-sum settlement or, alternatively, to pay $1000 per month until his liability was liquidated. Hatchett claims that the IRS did not respond to his letter, but he nevertheless began sending $1000 monthly payments. He stopped making these payments when, on January 21, 1981, the IRS seized and sold certain real property owned by Hatchett. In March 1983, Hatchett again wrote to the IRS to request an installment payment plan; he claims that he received no response. The government, however, claims that Hatchett received a written reply in April 1984, informing Hatchett that he owed a total of $847,780.46 ($827,791.96 in income taxes, interest, and penalties, and $19,988.50 in business taxes).

The government introduced evidence that during the period covered in the indictment, Hatchett was earning large sums of money from his cases. He settled one case that resulted in $900,000 in legal fees. The government claims that Hatchett converted these monies so as to make it impossible for the IRS to levy on them. He typically exchanged his clients' checks for a series of cashiers' checks; when the IRS levied on his bank accounts, it discovered that no funds were available to

satisfy the levies. He also used the money to purchase goods in other people's names. In March 1983, Hatchett paid $28,447.12 in cash for a Porsche 911 for his son. He contemporaneously spent large sums on the construction of a boxer training camp for his son in Otter Lake, Michigan. In May 1983, Hatchett bought $113,744.20 worth of car washing equipment for a business called Sparkle Car Wash, which he held in the name of his elderly father. In 1985, Hatchett purchased a foster care home in his wife's name for $100,000 cash.

In April 1984, Internal Revenue Agent Christine Gibson, newly assigned to Hatchett's case, reviewed his assets and a list of court cases in which he was involved, so that the IRS might attach any attorney's fees due him. Gibson then prepared a list of over 300 levies to be served on Hatchett's clients, opposing counsel, and insurance companies, directing that any monies owed to Hatchett be paid to the IRS.

On June 11, 1984, Agent Gibson met with Hatchett to discuss whether he was prepared to make payment on his taxes owed. When Hatchett was unwilling to disclose any financial information, Gibson served Hatchett with a summons to produce all documents regarding his assets. Gibson testified that Hatchett told her at the June 11 meeting that "he wanted to pay and he always planned to pay his taxes." Gibson also testified that her notes of a June 22, 1984 follow-up telephone conversation with Hatchett indicated that she believed he was "making moves to pay."

On July 13, 1984, Hatchett met with Gibson to review the documents requested by the summons. At this

meeting, however, Gibson never looked at any of the documents Hatchett provided. At this meeting, Gibson and Hatchett discussed a number of possible payment plans that could assist Hatchett in discharging his tax liability. After this meeting, not having reached an agreement with Hatchett about a payment plan, Gibson began serving the 300 levies she had prepared. *See United States v. Var-Ken, Inc.*, 875 F.2d 868 (6th Cir.1989) (unpublished per curiam) (reversing a summary judgment against the government in an action to enforce a levy and foreclose on funds assertedly owned by Hatchett).

Throughout 1985, Hatchett made several payments toward his tax debt totalling $80,000. He discontinued his $5000 weekly payments on September 23, 1985, when the IRS seized his Rolls Royce.

Hatchett reported adjusted gross income for 1982 of $829,940 and a tax due of $98,789. He filed his return, without payment, on March 7, 1984, nearly one year late.

Hatchett reported adjusted gross income for 1983 of $755,977 and a tax due of $336,799. He filed this return, without payment, a year late on April 15, 1985.

Hatchett reported adjusted gross income for 1984 of $307,410 and a tax due of $132,145. He filed this return, without payment, on April 15, 1985.

Hatchett reported adjusted gross income for 1985 of $400,788 and a tax due of $158,360. He filed this return, without payment, on April 1[illegible], 1987. On an amended return, he reported an adjusted gross income for 1985 of $571,437 and a tax due of $244,183. He filed this return,

with a total payment of $100,000, on April 7, 1988, two years late.

Hatchett reported adjusted gross income of $445,535 for 1986 and a tax due of $195,699. He filed this return on April 8, 1988, one year late and without payment.

Hatchett raises eight assignments of error: one concerning the jury selection process, four concerning evidentiary rulings, and three concerning his sentencing. We consider them in that order.

II

Hatchett's first claim is that the government exercised its peremptory challenges during jury selection in a racially discriminatory manner. We find no merit in this claim.

The jury consisted of three Blacks and nine whites. The record indicates that the jury venire consisted of 70 people. Fifty-five identified themselves as white, 14 as Black or Negro, and one as Asian. The prosecution was given six peremptory challenges, while the defense had ten. Each side had one additional peremptory challenge that could be exercised only against an alternate juror. The district court ruled that if a party chose to pass on the exercise of a peremptory challenge, then that peremptory was lost.

Hatchett claims that the procedure by which the government exercised – or waived – its peremptories was racially motivated and discriminatory. The original jury panel drawn contained eleven whites and one Black. The government used its first peremptory to strike the only

Black juror. That juror has a son who had been criminally charged in June 1988; she also had recently been audited. After the government excused the Black juror, she was placed by a white juror.

The government then waived each of its peremptories against remaining white jurors. Hatchet claims that the government had stronger cause to excuse several of the white jurors than it did to excuse the lone Black juror. During voir dire, for example, it came out that several of the eleven original white jurors had encounters with the government that were allegedly more unpleasant than the Black juror's. One was audited in 1980, and he admitted to the court that he wasn't "thrilled about paying [his] taxes." Another had fallen behind in his taxes five years before the trial and had to make payments over a three-year or four-year period. A third had been arrested for drunken driving in October 1985. One of the alternate jurors, a white woman, had been audited in January 1989, one month before the trial began. Hatchett claims that the reason the government did not excuse any of these white jurors was because it did not want to risk impaneling a Black replacement juror from the venire.

While the government waived each of its first four peremptories against the remaining jurors, the defense exercised each of its first four peremptories to excuse a white juror. Each was replaced by a white juror. After the government waived its fourth peremptory, the defense requested a conference outside the presence of the jurors. Hatchett, whom the court had permitted to participate in the presentation of his case, made the following appeal to the court:

> It seems the impact of what the Government is doing, although she has a perfect right to do it, is negate our potential of having a certain number of black people on the jury to try me and my wife. We are entitled to a fair selection of people to sit in judgment of us, a part and parcel would be a group of people who have a peculiar identity with me. The fact that the Government has chosen to pass peremptorily on challenges means that it reduces the prospect of it reducing any of those persons by 50 percent. The only peremptory she has offered has been a challenge to disqualify a black juror, that's the only time she's exercised her prerogative to summarily remove a juror, that juror is black. You have held us tightly with respect to how many challenges we can have. . . . [T]he Court should mitigate the harm to me and my wife by giving us more challenges. We have ten black people left on the jury panel and we have none seated except an alternate and, judge, we are not going to have any representatives of the black race on this jury if the prosecution is permitted to persist in her exercise of her prerogative of not peremptorily challenging anybody.

The government offered to have an *in camera* hearing with the court to explain the reasoning behind its jury selection procedure. The defense had no objection.[1] In chambers, the assistant United States attorney explained to the court her reason for excusing the Black juror and no other; only the Black juror had recently had an experience in criminal court and been audited. The other jurors' experiences were considerably more remote, and thus

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[1] After the court announced the result of the *in camera* meeting, however, the defense did object to the court's holding a hearing *in camera*.

they were less likely to harbor resentment against the IRS. The court was satisfied by the prosecutor's explanation, and found that the government's juror selection process was not tainted by racial discrimination.

The jury selection process then continued, and the government exercised no other peremptory challenges.[2] After the defense exercised its peremptories and several other jurors were excused for cause, additional jurors were impaneled and the final jury consisted of three Blacks and nine whites.[3]

Hatchett argues that it was pure fortuity that three Blacks were impaneled on the final jury, and that this end result does not render moot the constitutional issue of the government's allegedly discriminatory selection process. Hatchett claims that the *withholding* of peremptory challenges violated his fourteenth amendment right to be free from discriminatory jury selection procedures, as stated in *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986): "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black

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[2] The government did use its one available peremptory challenge for alternates to strike a Black alternate juror, who was replaced by the Asian juror.

[3] Although Hatchett claims in his brief that the jury consisted of ten whites and two Blacks, all other indications are that the jury consisted of three Blacks, and Hatchett's attorney so agreed at trial. (The defense had questioned whether one juror was Black or Asian-American, but she listed herself as Black on her jury questionnaire.)

jurors as a group will be unable impartially to consider the State's case against a black defendant."[4]

The *Batson* Court enumerated three elements of a prima facie case of purposeful discrimination. First, the defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' " Third, the defendant must show that "these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." 476 U.S. at 96, 106 S.Ct. at 1723 (quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 892-93, 97 L.Ed. 1244 (1953)). Once the defendant has made out a prima facie case, the burden shifts to the government to come forward with a neutral explanation for challenging Black jurors. *Ibid.* Hatchett argues that he has made out of prima facie case of discrimination and that the prosecutor's apparently neutral explanation is invalid.

Hatchett claims that the prosecutor's reasons for striking the Black juror were equally applicable to similarly situated white jurors, and thus the prosecutor's

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[4] Since this was a federal trial, the fourteenth amendment, to which Hatchett appeals, is not implicated. Rather, Hatchett should be pursuing his claim under the fifth amendment. *See United States v. Sangineto-Miranda*, 859 F.2d 1501, 1519 (6th Cir. 1988).

explanation was pretextual. In such a case, the prosecutor's explanation does not withstand scrutiny. *Garrett v. Morris*, 815 F.2d 509, 513-14 (8th Cir.), *cert. denied*, 484 U.S. 898, 108 S.Ct. 233, 98 L.Ed.2d 191 (1987).

We see no clear error in the court's determination that the circumstances of the white jurors who were not challenged differed from those of the two Blacks who were excused.[5] The only white juror who had been audited was audited in 1968. This remoteness of his audit was an important distinction. Another white juror had fallen behind in his tax payments five years earlier, but there was no evidence that he had been audited or had had a bad experience with the IRS. The government exercised its one peremptory challenge reserved for the alternate jurors against the Black alternate rather than against the white alternate because the Black alternate had been a client of Hatchett. Although the white alternate had been audited one month before trial, there was no indication that her audit did not proceed favorably; the government saw the Black alternate as a greater risk to impartiality, for reasons apart from her race.

Furthermore, we find that Hatchett did not establish a prima facie case under *Batson*. All of the attendant circumstances do not raise an inference that the prosecutor excluded Blacks from the jury on account of their race.

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[5] The other Black who was excused was an alternate. The prosecutor tried to convince the court to strike the alternate for cause because she was one of Hatchett's former clients. When the court refused, the government exercised against her its one peremptory challenge reserved for alternatives.

In *United States v. Sangineto-Miranda*, 859 F.2d 1501, 1521-22 (6th Cir. 1988), we reasoned:

> If, after the jury selection process has ended, the final jury sworn has a percentage of minority members that is significantly less than the percentage in the group originally drawn for the jury (or in the whole jury pool or in the district); then that would be a factor pointing toward an inference of discrimination. If, on the other hand, the percentage of minority members in the ultimate jury is the same or greater, that would be a factor tending to negate the inference of discrimination.

In this case, the jury pool of 70 contained 14 Blacks (20%). The final jury consisted of three Blacks and nine whites (25% Black).

Furthermore, the district court credited the prosecutor's explanation for her pattern of striking or not striking certain jurors. The Supreme Court has ruled that findings of no intentional discrimination turn largely on an evaluation of credibility, which we as a reviewing court should accord great deference. *Batson*, 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 no. 21.

Contrary to Hatchett's implication, he is not entitled to a jury composed largely of members of his race. In *Batson*, the Court ruled "that a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.' " 476 U.S. at 85, 106 S.Ct. at 1716 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 305, 25 L.Ed. 664 (1880)). Rather, the defendant has a right "to be tried by a jury whose members are selected pursuant to non-discriminatory criteria." *Ibid.* Because Hatchett was tried

before a fairly selected jury, we deny his claim of racial discrimination.

III

A

Hatchett next assigns as error the exclusion, during direct examination of Frank Gettleson, of testimony by Gettleson about statements allegedly made by Hatchett to Gettleson about his tax troubles. The defense called Gettleson to testify about the tax advice he gave Hatchett in 1979 and 1980. When Hatchett's trial counsel asked Gettleson to explain to the jury the content of a conversation Hatchett had with him in 1980, the government objected that the answer would be hearsay and would be irrelevant. The district court sustained the objection, apparently on the ground of hearsay, and precluded Gettleson from testifying about any disclosures Hatchett made to him.[6] Hatchett now claims that the district court improperly excluded Gettleson's testimony, which was crucial to Hatchett's defense that he relied on the advice of counsel in withholding tax payments. He argues that the court's ruling improperly made proof of the "advice of counsel" defense difficult.

Hatchett argues on appeal that the testimony Gettleson would have provided would not have constituted hearsay because it would not have been offered for the

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[6] The court found that the testimony was offered to prove the truth of the matter asserted.

truth of the matter asserted.[7] F.R.E. 801(c). The statements would have concerned disclosures that Hatchett made to Gettleson about his tax liabilities as of 1980. Hatchett, claims that this testimony was offered not to prove the truth of the content of Hatchett's statements about his tax situation, but rather to prove that Hatchett made a full disclosure of all pertinent facts to Gettleson. Hatchett claims that the court prevented the jury from accepting Hatchett's advice of counsel defense, by disabling it from determining whether Hatchett made a complete disclosure to Gettleson. Hatchett argues that the testimony was not offered to prove its truth, but rather so that Hatchett could comply with the full disclosure requirement of his defense. *See United States v. Eisenstein*, 731 F.2d 1540, 1545 (11th Cir. 1984).

Hatchett declined to testify. Gettleson's testimony, therefore, was allegedly the only vehicle for getting Hatchett's advice of counsel defense before the jury.[8]

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[7] Upon the government's objection, Hatchett's counsel initially conceded that the testimony she was trying to elicit would be hearsay.

[8] This argument collapses under the weight of its own logic, however, because the fact that Gettleson, not Hatchett, was the vehicle for getting the statements before the jury is what distinguishes *Eisenstein*. In *Eisenstein*, the court admitted the lawyer's testimony because it was not offered to prove the truth of the matter asserted. A codefendant had already related the matters disclosed, and the lawyer's recounting of the disclosures was not needed to prove their truth. by contrast, the jury in this case would have been induced to accept the truth of the matters disclosed by Hatchett when *Gettleson* testified to them.

Hatchett thus contends that the exclusion of this testimony completely deprived Hatchett of his right to make out a defense.

We hold that the district court did not abuse its discretion in refusing to admit Gettleson's proffered testimony regarding Hatchett's disclosures to him. The district court, in denying Hatchett's motion for bond pending appeal,[9] noted that.

> [a]lthough attorney Gettleson's testimony may have been admissible for the limited purpose of showing defendant made a disclosure, it was not admissible to prove the facts constituting the disclosure. The advise [sic] of counsel defense requires not only evidence of disclosure, but also evidence that the facts disclosed are relevant. . . . the relevance of the facts disclosed could only have been determined *had the jury considered as truthful* the out-of-court statements which attorney Gettleson was asked to recite.
>
> Had defense counsel represented to the Court the evidence of the factual basis underlying the disclosure would be tied in through a different witness, or asked that the statements be admitted for the limited purpose of showing disclosure and with a cautionary instruction to the jury, this Court's ruling may have been different. However, no such request or representation was made.

(Emphasis supplied.) Having determined that Gettleson's testimony was offered to prove the truth of Hatchett's out-of-court disclosures, and in the absence of a proffer by Hatchett's counsel of other evidence that could prove

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[9] On June 15, 1989, a panel of this court reversed the order denying bond pending appeal.

the truth of the disclosures, the court properly ruled that Hatchett's declarations came within the definition of hearsay and were inadmissible.

We find that the court's ruling could not have undermined the jury's ability to determine the strength of the advice of counsel-defense. The defense managed to get the substance of Hatchett's statements to Gettleson before the jury by other means. Although the court sustained the government's objection to the question asking Gettleson directly what Hatchett told him, Gettleson nevertheless testified to several disclosures by Hatchett:

> – Hatchett "tried to pay the tax and apparently met with some opposition in that regard;"
>
> – "he couldn't pay it all at one time and it was a fair amount of money at that time and he was going to try and make some orderly payments;"
>
> – Hatchett owed "probably one hundred seventy-five to two hundred thousand, something in that area;"
>
> – "I knew he had been audited incessantly prior to that time;"
>
> – "I knew he had made payments, he had made some payments along the way;"
>
> – "he was concerned if there would be any other ramifications, such as criminal ramifications, that may befall him."

On cross examination, Gettleson admitted that:

> – he did not know exactly when Hatchett had been on an installment payment program;
>
> – he did not know that the installment payment program was stopped at the end of 1978 because Hatchett was bouncing checks;

> – he did not know that Hatchett had failed to make estimated tax payments for the 1979 tax year;
>
> – they "didn't really discuss" whether Hatchett would make current estimated tax payments in 1980;
>
> – Hatchett never told him whether the IRS had required Hatchett as a condition of the installment payment program, to remain current with his estimated tax payments.

This testimony was sufficient for the jury to determine whether Hatchett had made a full disclosure to Gettleson of all pertinent facts.

Furthermore, nothing said in closing arguments could have confused the jury as to Hatchett's advice of counsel defense. The government did not claim that Hatchett's defense must fail because there was no proof of full disclosure (proof, Hatchett would argue, that was impermissibly kept from the jury). The government simply argued, in its initial closing and in its rebuttal closing, that the advice of counsel defense should not protect Hatchett prospectively, because Gettleson never explicitly advised Hatchett not to pay taxes from 1981 to 1986. Hatchett in turn argued in his closing that "[Gettleson did not] have to tell me not to pay in '81, '82, '83, he already told me that when I sat down and talked to him." At no point was the jury misled either as to the elements of an advice of counsel defense or as to the quantum of proof necessary to find "wilfulness" in Hatchett's failure to pay. Under these circumstances, we find no abuse of discretion in preventing Gettleson from testifying directly as to the truth of Hatchett's disclosures.

B

Hatchett next contends that the district court abused its discretion by precluding attorney Gettleson from explaining the legal authority for the advice he gave Hatchett. The government objected to the proffered testimony on the ground that the witness would be testifying to the jury about legal issues. The court limited Gettleson's testimony to statements about the general legal authority on which he relied in advising Hatchett, "without going into any specifics."

Hatchett asserts that the testimony would have proved that Gettleson conducted specific research on the issue of withholding payment from the IRS in good faith. If Hatchett could have shown the jury that the legal principles underlying the advice upon which he relied were well established in the case law, he claims that he could have made out his advice of counsel defense. Moreover, Hatchett insists that Gettleson's testimony would not have invaded the court's province to instruct the jury on the applicable laws. Gettleson's proffered testimony allegedly bore only on his competence in correctly advising Hatchett on the law, while the court retained the ultimate authority to instruct on the law.

We find no abuse of discretion in limiting Gettleson's testimony to statements about the general legal authority on which his advice rested. Testimony about the specific results of Gettleson's legal research was properly excluded. Before the government objected, Gettleson was able to testify that:

> I did some research back at that time and I was confident in the research that I did, based upon

> the statute and based upon the case law that I found as a result of that research, that the position he had taken was a sound position and I told him as much. And I based it in part on the case of – .

The court then sustained the government's objection that any further statements would constitute legal argument in front of the jury. The court did not, however, prevent Hatchett from proving that Gettleson was competent to give him sound advice. The court merely restricted the means by which Hatchett could present his argument, so as to limit jury confusion.

In *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir.1986), we noted that witnesses "do not testify about the law because the judge's special legal knowledge is presumed to be sufficient, and it is the judge's duty to inform the jury about the law that is relevant to their deliberations." This rule is necessary to prevent the potential confusion that can arise if the law as presented by the witness conflicts with the law as instructed by the court. *Id.* at 600. Given the soundness of this rule, the district court did not abuse its discretion by excluding references to specific case law under the circumstances presented here.

C

Hatchett also complains about the government's cross examination of one of Hatchett's law partners, Marvin Smith, who became an associate in Hatchett; Dewalt, Hatchett, Mitchell, Morgan & Hall in 1981 and a partner in Hatchett, Dewalt, Hatchett & Hall (of which Hatchett is managing partner) in 1983, testified at trial as to the

nature of the law partnership. He further testified about Hatchett's efforts to obtain loans from the partnership in order to pay his taxes. On cross examination, the district court permitted the government to attempt to impeach Smith's credibility by questioning whether he himself had filed any income tax returns for tax years 1981-1986. Smith responded that he had not filed any such returns.

The defense objected to this cross examination on the ground of relevance. The prosecution argued that the questioning was relevant because it concerned the witness's bias. There had been extensive testimony about the partnership's dealings with the IRS, and this line of questioning was designed to illuminate the partners' general failure to cooperate with the IRS. The court was persuaded that the prosecution should be permitted to pursue this questioning, especially on cross examination.

Mr. Smith's cross examination was then continued to the next day. That next morning, before the jury entered the courtroom, the court entertained the defense's motion for a mistrial based on the previous day's cross examination of Smith. Although Hatchett had, on the previous day, objected to the prosecution's line of questioning only on the basis of Fed.R.Evid. 609 (Impeachment by Evidence of Conviction of Crime), the memorandum in support of the motion for a mistrial rested primarily on Fed.R.Evid. 608 (Evidence of Character and Conduct of Witness). Rule 608(b) states in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be

> proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Rule 609 allows for impeachment only through evidence of a felony conviction, Hatchett argues that Rule 609 did not apply to Smith, and Rule 608 was inapposite because Smith's failure to file timely returns did not relate to his character for truthfulness or untruthfulness. Thus, Hatchett contends, cross examination based on Smith's failure to file or to pay his taxes was inadmissible to attack his credibility. The defense requested that if the court was unwilling to grant a mistrial, it should at least give a curative instruction to the jury.

The court ruled:

> I'm going to give them an instruction that the only purpose is to attack his credibility and that his tax problem or his failure to pay taxes is not an issue in this case. I'm not granting a motion for mistrial.

Hatchett's counsel and the court then engaged in this exchange:

> [DEFENSE COUNSEL]: I would like to know whether the Court is making a specific finding that the activity elicited relates to [Smith's character for truthfulness or untruthfulness].
>
> THE COURT: I'm saying the questions and the answers tend to bring out any interest or bias that this witness may have and that this bears

> upon his credibility and I believe that's fair cross-examination.

Hatchett's argument rests on the notion that the testimony permitted on cross examination was inadmissible because it was not relevant to Smith's character for truthfulness or untruthfulness. Hatchett claims that the court, in finding that Smith had "a motive to be untruthful," merely found that it would have been advantageous to Smith to give false testimony; the court did not, and could not, find that Smith had a reputation for being untruthful. The specific acts of not filing tax returns provided Smith a *motive* to lie, but did not shed light on his *character* for truthfulness. Hatchet insists that failure to file tax returns and pay taxes is unrelated to character for truthfulness or untruthfulness.

We agree with the district court that Smith's failure to pay taxes was clearly probative of his credibility. Hatchett does not disagree that the government's cross examination of Smith was intended to show bias; he merely contends that evidence of bias is not an attack on credibility. However, a showing of bias is designed to attack a witness's credibility. *See, e.g., Davis v. Alaska*, 415 U.S. 308, 316 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) ("A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness"). This rule is sound because evidence of bias allows jurors to draw appropriate inferences about the reliability of the witness. *See United States v. Smith*, 831 F.2d 657, 662 (6th Cir.1987) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986) (quoting *Davis*, 415 U.S. at 318, 94 S.Ct. at

1111)), *cert. denied*, 484 U.S. 1072, 108 S.Ct. 1044, 98 L.Ed.2d 1007 (1988). An attack on a witness's credibility by demonstrating bias is permissible under Fed.R.Evid. 608(b)(1) precisely because it goes to the witness's character for truthfulness.

The impeachment testimony in fact confirmed Smith's bias by revealing a common pattern of activity with Hatchett: flouting the tax laws by not filing returns or paying taxes when they were due. Smith's behavior was directly relevant to his credibility, and his testimony was admissible.

D

Hatchett's next claim is that the district court abused its discretion by excluding from evidence a videotaped segment from a "60 Minutes" television broadcast that focused on the collection techniques of a local IRS office. During his cross examination of IRS agent Robert Bednarczyk, Hatchett attempted to show the videotape in order to convince the jury that IRS agents used oppressive collection tactics. The government objected on relevance grounds, noting that the television show as broadcast in 1981 and made reference to matters not in evidence, and on hearsay grounds. The court ordered defense counsel to proceed to another topic of examination until the court had viewed the tape and ruled on its admissibility. Two days later, the court issued a ruling denying Hatchett's request to show the videotape.

The court found that the tape was "classic hearsay." It did not "know how the Government can possibly cross-examine anything on this film. In addition . . . [t]he

incidents in this case involve actions subsequent to 1981. I find it first of all hearsay and, second of all, not relevant."

Hatchett claims that the court's ruling deprived him of his right effectively to cross examine a government witness. He contends that the tape was not hearsay because it was not offered for the truth of its contents, but only to test the witness's conclusion that Hatchett's failure to file a joint return for him and his wife was unusual. Hatchett intended to show that it would have been reasonable for a person to forego the financial benefits of a joint return (as compared to separate returns) in exchange for security from the reputedly unreasonable actions of the local IRS division. Hatchett also disputes the finding that the tape was irrelevant. Although the tape referred to IRS collection procedures in 1981, the government's expert was able to testify on direct examination about tax years 1979-1982. The 1981 broadcast, by comparison, was not too remote to be relevant.

We again find that the court did not abuse its discretion by making this evidentiary ruling. Despite Hatchett's assertion that he did not intend to offer the videotape for the truth of its contents there were no other facts in evidence by which to judge its truthfulness. No independent evidence had been admitted to prove the truth of the allegations made in the "60 Minutes" segment. In cross examining the government's witness on his opinion that Hatchett's not filing a joint return was unusual, Hatchett needed a basis for his explanation that he was attempting to avoid the alleged pressure tactics of the IRS. This basis lay only in the videotape; its truthfulness would have to have been assumed by the jury in order for Hatchett's

proffered explanation to have had any validity. Furthermore, there was no way for the government to detect whether the tape had been altered, and the government would have been unable to challenge the accuracy of the broadcast. Under these circumstances, the court did not abuse its discretion in excluding this evidence.

IV

A

Hatchett contends that the court violated Fed.R.Crim.P. 32(c)(3)(D) by not adequately addressing his allegation that the presentence report contained a factual inaccuracy. He argues that the court neither made a finding as to the truth of the allegation, as required by Rule 32(c)(3)(D)(i), nor made a determination that no such finding was necessary because the matter would not be taken into account in sentencing, as required by rule 32(c)(3)(D)(ii). Hatchett insists that the court's failure to comply strictly with the rule requires us to remand for resentencing.

The alleged error in the presentences report relates to the applicability of parole guidelines. (Hatchett was not sentenced under the Sentencing Guidelines, since the court determined that the criminal activity charged in the indictment was completed before the effective date of the guidelines.) The probation officer estimated according to the Parole Commission's guidelines, the amount of time that Hatchett would serve in prison before being released on parole. Hatchett claims that the parole guidelines

computation was inaccurate, and that the court relied on this erroneous presentation report.[10]

The parole calculations are not a part of the sentence imposed by the court. Parole release is an administrative determination separate from the imposition of a term of imprisonment. Furthermore, the parole guideline worksheet states that it is an estimate and that it has no binding effect either on the sentencing judge or on the Parole Commission. The district court adequately responded to Hatchett's argument at the sentencing hearing:

> THE COURT: What are you asking me to do with the guidelines? They're the guidelines of the parole commission, not this Court.
>
> [DEFENSE COUNSEL]: However, they have been made a part of the probation officer's report. We believe they are inappropriate because they do not apply to misdemeanor offenses. We would ask the Court to disregard completely the parole guidelines assessment because we don't believe they apply.
>
> THE COURT: Okay.

The court agreed it would disregard the contested information. No due process violation resulted, since the court ignored the alleged error in the report. In addition, Rule 32(c)(3)(D) was not violated by the absence of a written record. The rule only concerns factual inaccuracies, not

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[10] The court actually stated: "I've had an opportunity to review this file, I've had an opportunity to review my notes, I've had an opportunity to preside over this case and I've had an opportunity to review the presentence report. . . . "

calculations explicitly labelled "estimates" that are irrelevant to sentencing.

B

Hatchett's next contention regarding his sentencing is that the court should have required the jury to specify in its verdict whether his offenses were completed prior to November 1, 1987, the date the Sentencing Guidelines became effective. If the offenses that underlay the jury's guilty verdict were not completed before November 1, 1987, then Hatchett contends that he should have been sentenced under the guidelines, not under the statute, relying on *United States v. Sams*, 865 F.2d 713, 715 (6th Cir.1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3187, 105 L.Ed.2d 695 (1989). Hatchett claims that it was plain error for the court to fail to secure a specific finding from the jury as to the completion date of the offenses.

Hatchett alleges that confusion was caused by the government's introduction of evidence that extended into 1987. There was evidence of Hatchett's expenditures on such luxury items as furs and automobiles as late as 1987. There was evidence of substantial legal fees earned by Hatchett as late as December 1987. Hatchett claims that if the jury found that his willful act of non-payment extended beyond November 1, 1987, then the court erred by not sentencing him under the guidelines.

We note that *United States v. Sams* does not support the proposition Hatchett suggests. The issue in *Sams* was not whether the crime had been completed before November 1, 1987 for guidelines purposes, but rather

whether the crime had extended into the time prosecution was statutorily permitted. In *Sams*, we concluded that the failure to instruct the jury to specify the date on which the defendant's failure to pay his taxes became willful was not plain error, since the jury *could* have concluded that every element of the crime occurred within the time prosecution was permitted. 865 F.2d at 716.

Hatchett's claim is foreclosed in any event because he did not object to the absence in the jury instructions of a request for a specific finding as to the date on which the crimes were completed. As we held in *Sams:*

> Sams did not object at trial to the jury instructions given by the district court. Thus, the issue of whether the court *should* have instructed the jury to specify the date on which Sam's failure to pay taxes became willful is not before us. Fed.R.Crim.P. 30.

865 F.2d at 716 (emphasis in original). Where a party fails to object at trial, reversal is required only in those exceptional circumstances where necessary to avoid a miscarriage of justice. *United States v. Hook*, 781 F.2d 1166, 1172 (6th Cir.) (citations omitted), *cert. denied*, 479 U.S. 882, 107 S.Ct. 269; 93 L.Ed.2d 246 (1986). As this is not such an exceptional case, we decline to overturn the sentence.

C

Hatchett's final contention is that the district court erred by conditioning probation on the payment of "all back taxes" during the period of probation. He argues that this condition demands restitution based on counts in the indictment of which he was acquitted.

Hatchett notes that 18 U.S.C. § 3651 permits a court to order restitution as a condition of probation, but only for those counts on which a defendant has been convicted. Hatchett was convicted only on the misdemeanor counts of failure to pay taxes in 1982, 1983, 1984, and 1986. He was acquitted on the tax evasion counts and for failure to pay taxes for 1985. Hatchett argues that the court was limited to ordering restitution for amounts included in the four misdemeanor counts on which he was convicted. He therefore demands resentencing.

We find no abuse of discretion in the district court's order. The district court did no more than insist that Hatchett comply with the law as a condition of probation. The order should be interpreted as being limited to obligations that either have gone to judgment or are otherwise legally owed. The order cannot be taken to require the payment of tax debts that are legitimately in contest.

The order need not be limited to amounts owed for the years for which Hatchett was convicted. The payment of tax debts for other years that have been reduced to judgment or are due under 25 U.S.C. § 6151 is an appropriate condition of probation, since such debts represent definite legal obligations.[11] *See United States v. Taylor*, 305 F.2d 183, 188 (4th Cir.), *cert. denied*, 371 U.S. 894, 83 S.Ct. 193, 9 L.Ed.2d 126 (1962) (the court may require, "as a condition of probation, the payment of all taxes and

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[11] Section 6151 provides: "When a return of tax is required under this title or regulations, the person required to make such return *shall*, without assessment or notice and demand from the Secretary, . . . pay such at the time and place fixed for filing the return. . . . " (Emphasis supplied)

penalties lawfully determined to be due and collectible"). *See also United States v. McMichael*, 699 F.2d 193, 195 (4th Cir.1983) (the court may order the defendant to repay taxes "whenever the amount . . . is legally determined"); *United States v. Vaughn*, 636 F.2d 921 (4th Cir. 1980) (recognizing that conditioning probation on the payment of "all taxes, interest, and penalties presently owed to the Internal Revenue Service" is proper, but vacating the order that probation be further conditioned on reimbursing the government for the expenses of investigating the offense).

Contrary to Hatchett's contention, the district court's order was not one for restitution under 18 U.S.C. § 3651. Therefore, conditioning probation on the payment of "all back taxes" was not an abuse of discretion. As in *Taylor*, the court could properly require "payment of those taxes reported . . . since such liability is admitted." *Id.* at 187. In addition to those taxes "shown by the defendant's returns to be due," the court may condition probation on the payment of those taxes found by the jury to have been willfully not paid. *Id.* at 188. Nothing in the probation conditions should be interpreted to prevent Hatchett from contesting, in good faith, any proposed assessment.

For the foregoing reasons, the conviction is AFFIRMED.

NATHANIEL R. JONES, Circuit Judge, dissenting from Parts III(A) and IV(C).

I.

In Part III(A) of its opinion the majority holds that evidence offered by Frank Gettleson, Hatchett's former

tax attorney, as to disclosures made by Hatchett when he sought legal advice for his tax difficulties was properly excluded as hearsay. As this testimony was vital for establishing the essential disclosure element of Hatchett's advice of counsel defense and the trial judge's improper exclusion of this evidence made proof of the advice of counsel defense substantially more difficult I would reverse and remand.

Hatchett contends that the testimony was not offered for its truth, but instead to prove that certain disclosures were in fact made. Hatchett cites in support of his position *United States v. Eisenstein*, 731 F.2d 1540, 1545 (11th Cir.1984), which in circumstances very similar to this case holds that testimony of defendant's lawyer relating to disclosure by defendant was improperly excluded as hearsay because it was offered to demonstrate the lawyer's knowledge and that defendant disclosed.

The majority holds that Gettleson's testimony as to Hatchett's disclosure was properly excluded by the trial judge as hearsay offered for the truth of the matter asserted. In reaching this conclusion, the majority has conflated two issues: first, whether the evidence was offered to demonstrate that defendant disclosed his tax situation to his attorney; and secondly, whether the content of that disclosure was true.

In answer to the first issue, there is no requirement that a litigant supply corroborating testimony in order to demonstrate that he is putting on evidence to show that certain statements were in fact made. It would be perfectly legitimate for Gettleson to testify to the fact that certain statements were made to him. The jury would

then decide whether *Gettleson* told the truth as to the fact that the statements were made. Whether or not the statements themselves were true or not raises a wholly separate inquiry. Presumable, if Gettleson testified to Hatchett's disclosure, Hatchett would still need to produce evidence that he disclosed accurate and truthful information to Gettleson. *But he need not do so with the same witness.* Whether or not Hatchett ultimately put on enough evidence for the jury to infer that he had made out his advice of counsel defense has no bearing on the propriety of the trial judge's ruling on the admission of Gettleson's testimony. The appropriate procedure would have been for the trial judge to admit the testimony and give proper limiting instructions at the close of trial if they seemed appropriate.

The majority seems to place great weight on the fact that Hatchett did not testify to the matters disclosed and therefore assert their truth. The majority suggests that if Hatchett had testified, or put on other evidence that went to the truth of the disclosure he made to Gettleson, then Gettleson's statements that disclosure was made would only go to the fact of disclosure. But this argument is circular. Presumably, if the defense put on Hatchett to testify as to his conversations with Gettleson, this testimony would have been objected to as hearsay on the same grounds as Gettleson's. The defense would then have been required to corroborate Hatchett's testimony with other evidence as to the truth of his disclosure statements. The logical witness to corroborate Hatchett would be Gettleson. But then, that is where we started.

The fact of the matter is that the trial judge precluded Hatchett from putting on evidence which was essential to

his only defense: advice of counsel. It was for the jury to decide whether the facts disclosed were accurate based upon a comparison of the record to the alleged disclosures to Gettleson. In order to put on Gettleson's testimony as to disclosure statements made to him by Hatchett, the defendant was not required to offer support for the truth of the disclosures independent of the facts in the record concerning the amount of his tax liability, the filing of returns, the audit, etc. The trial court and the majority are in error in ruling that independent confirmation of the truth of a statement is required when that statement is not offered for its truth.

As the exclusion of this testimony went to the heart of Hatchett's defense and therefore, to the heart of the fairness of his trial, I would reverse.

II.

I also disagree with the court's analysis and conclusions in Part IV(C) of its opinion. In that section, the majority holds that the trial court did not abuse its discretion when it made Hatchett's payment of "all back taxes" (not only those owed on indictments for which he was convicted) a condition for Hatchett's probation. The majority reasons that it was legitimate for the trial judge to include in his conditions for Hatchett's probation that Hatchett pay back taxes even on those counts for which he was acquitted because these debts represented "definite legal obligations."

The majority's reasoning here seems to me to be faulty. The fact that defendant has outstanding legal obligations unrelated to those offenses for which he was

convicted should have no bearing on defendants probation relating to his convictions. For example it certainly would not be appropriate for the trial court to condition probation from a criminal offense on the defendant's paying his rent or his credit card debts. The absurdity and inherent danger of allowing trial courts to condition probation on the payment of debts unrelated to a defendant's convictions merely because they represent "definite legal obligations" seems clear.

In *United States v. Green*, 735 F.2d 1203, 1205 (9th Cir.1984), the district court sentenced Green to three years probation for failure to file returns for the years 1975-77, on the condition that Green pay all back taxes due and owing. The Ninth Circuit ruled that the district court had overreached its authority stating that, "In criminal tax cases, the court may order restitution only of back taxes for the years involved in the conviction." *Id.* I agree with the Ninth Circuit's conclusion and would reverse in this case as the district court only had the authority to order restitution for the tax years in which Hatchett was convicted of a tax crime.

Such a rule makes sense not only out of basic fairness to the defendant, but also because an order to pay "all back taxes" may place an obligation on the defendant which exceeds the term of the probation and hence the court's jurisdiction over the case.

> 'Normal' criminal restitution remains within the equitable power of the judge who orders it; he can modify his order (or at least refuse to revoke probation for failure to comply) if the circumstances of the defendant change. When the court purports to order a particular schedule of payment extending beyond the period of the court's

> jurisdiction, however, the opportunity for equitable adjustment ceases.

United States v. Bruchey, 810 F.2d 456, 460 (4th Cir.1987). Applying this reasoning in interpreting the Victim and Witness Protection Act, 18 U.S.C. §§ 3579 and 3580, the *Bruchey* court reversed the district court's conditioning defendant's 5 year probation on signing a promissory note for payment of restitution of embezzled funds over a 21 year period. While the Victim Act is not at issue here, the rationale seems apposite: the court may not order restitution which exceeds the term of probation. While the district court in the case at bar made no findings as to Hatchett's ability to pay the "restitution" ordered, it would appear given. Hatchett's tenuous financial circumstances and the prior payment arrangements he negotiated with the Internal Revenue Service, that the court's order to pay "all back taxes" will involve payments beyond the 5 year probation. Thus, in addition to exceeding its authority by conditioning Hatchett's probation on the payment of debts unrelated to the convictions, the district court exceeded its authority by ordering restitution which will in all likelihood extend beyond the probation period.

I recognize that the government has an interest in recovering back taxes but it may not do so by tacking on debts unrelated to a criminal defendant's conviction by making their payment a condition of probation for offenses for which the defendant was convicted. A defendants' sentence must relate only to the crimes for which he was convicted. By allowing the government to include

payment for acquitted offenses in a sentence for convicted ones, the court today unsettles this time-honored principle.

III.

For the foregoing reasons I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

UNITED STATES OF AMERICA, Plaintiff, vs. ELBERT L. HATCHETT, and LAURESTINE HATCHETT, Defendants. _____/	CASE NO. 88-CR-80736-DT HONORABLE LAWRENCE P. ZATKOFF

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Court house, in the City of Detroit, State of Michigan, on the 6th day of June, 1989.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

Defendant Elbert Hatchett was charged with an eight-count indictment for various income tax violations. The indictment consisted of three felony counts and five misdemeanor counts. This Court presided over a jury trial which resulted in defendant being found guilty of four of the five misdemeanor counts and not guilty on the remaining counts.

On June 1, 1989, defendant was sentenced. The sentence included a term of incarceration. At sentencing, defense counsel motioned the Court for bond pending appeal. Both defendant and the Government briefed the issue of bond pending appeal in Sentencing Memorandums presented to the Court.

Having reviewed the briefs and considered the oral arguments made during the sentencing, the Court renders the following opinion.

The issue of bond pending appeal is governed by the Bail Reform Act of 1984, 15 U.S.C. §3134(b), which provides in relevant part:

> The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds –
>
> (1) By clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to Section 3142(b) or (c); and
>
> (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.
>
> If the judicial officer makes such findings, he shall order the release of the person, in accordance with the provisions of section 3142(b) or (c).

Defendant bears the burden of proving that both of the above cited prerequisites exist. *United States v. Powell*, 761 F.2d 1227, 1232 (8th Cir. 1985).

In this case, the government's brief does not address the first criterion and thus, conceeds [sic] by implication that defendant is not likely to flee and defendant does not pose a danger to the community.[1] The issue, therefore, becomes whether defendant will present on appeal a

substantial issue of law likely to result in reversal or an order for a new trial. If the Court finds defendant will raise on appeal at least one substantial legal issue likely to result in reversal or a new trial, the Court must grant bond pending appeal. Alternatively, if the Court finds that defendant's issues on appeal are not likely to result in reversal or a new trial, the Bail Reform Act mandates defendant be detained and commence serving his sentence while his appeal is pending.

In *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985), the Sixth Circuit set forth the following standard for determining what constitutes a substantial question likely to result in reversal or an order for a new trial:

> [A]n appeal raises a substantial question when the appeal presents a "close question or one that could go either way" and that the question "is so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor." (Citations omitted).

Defendant asserts there exists three appealable issues likely to result in reversal. Applying the *Pollard* standard to the issues raised by defendant, the Court finds defendant has not raised a substantial question likely to result in reversal or a new trial.

First, defendant submits the Court erred by finding portions of Frank Gettleson's testimony inadmissible. Defendant presented Mr. Gettleson, an attorney, in an effort to establish the defense of advice of counsel.[2] The Court precluded Mr. Gettleson from testifying about what Mr. Hatchett said to him in 1979 and 1980. The Court

found that this line of questioning called for a hearsay response and lacked relevance.[3]

Defendant argues that the testimony which he sought to illicit was not hearsay and should have been admitted. Defendant submits the Court's failure to admit the testimony constituted reversible error. Defendant relies upon *United States v. Eisenstein*, 731 F.2d 1540 (11th Cir. 1984) to support his position. *Eisenstein* is distinguishable from the case at bar.

In *Eisenstein*, two defendants were charged with the willful failure to file Currency Transaction Reports incidental to the operation of their currency exchange business. Defendants argued that they relied in good faith on advice of their counsel. One of the defendants testified about the substance of disclosures he made to their business attorney. Defendants called as a witness the business attorney who rendered the advice upon which defendants allegedly relied. The trial court precluded the attorney from testifying about what the defendant said to him before he rendered advice to the defendants. The court reasoned the question called for a hearsay response.

On appeal, defendants argued the witness's testimony was not being offered to prove the truth of the matter asserted. Rather, the testimony was offered as evidence that defendants made a disclosure regarding their business activity prior to the time the witness rendered his advice to the defendants.

The government conceeded [sic] the trial court erred in sustaining the hearsay objection. The government argued, however, that the error was harmless because one of the defendants testified as to the substance of his

conversations with his attorney and, in addition, because both sides argued to the jury as if defendant did indeed make a full disclosure to his attorney.

The Eleventh Circuit rejected the government's harmless error argument:

> The evidence of full disclosure, consisting entirely of [defendant's] unsupported testimony, *could have been corroborated by his lawyer.* The trial judge's failure to permit this highly relevant testimony cannot be dismissed as harmless error. Therefore, we reverse. (Emphasis added.)

Eisenstein, 731 F.2d at 1546.

The distinguishing factor between *Eisenstein* and the case at bar is that in *Eisenstein*, the out-of-court statement was merely offered to corroborate that disclosure was made. In the case at bar, there was no evidence offered from defendant or any other source to support the facts constituting the disclosure. "Advice of counsel is no defense unless the defendant gave his attorney all the relevant facts, and unless counsel specifically advised the course of conduct taken by the defendant." *U.S. v. McLennan*, 563 F.2d 943 (9th Cir. 1977). Although attorney Gettleson's testimony may have been admissible for the limited purpose of showing defendant made a disclosure, it was not admissible to prove the facts constituting the disclosure. The advise of counsel defense requires not only evidence of disclosure, but also evidence that the facts disclosed are relevant. There was no evidence submitted at the trial to support the conclusion the disclosure to which attorney Gettleson was to testify was a disclosure of the relevant facts. The relevance of the facts disclosed could only have been determined had the jury

considered as truthful the out-of-court statements which attorney Gettleson was asked to recite. There being no evidence to support the underlying factual basis of the disclosure made, this Court finds that the statements offered by attorney Gettleson, unlike those offered in *Eisenstein*, were necessarily offered not only to prove that disclosure was made, but also to prove the truth of the out-of-court statements which defendant sought to solicit from attorney Gettleson. Therefore, the testimony in question was inadmissible hearsay.

Had defense counsel represented to the Court the evidence of the factual basis underlying the disclosure would be tied in through a different witness, or asked that the statements be admitted for the limited purpose of showing disclosure and with a cautionary instruction to the jury, this Court's ruling may have been different. However, no such request or representation was made.

Although the Court finds *Eisenstein* distinguishable from the facts at bar, this court is not sitting in review of itself. The only issue to be resolved by this Court is whether a substantial appealable issue exists which is likely to result in reversal or a new trial. Assuming arguendo this Court erred by excluding portions of the Gettleson testimony, that error is not reversible error.

As previously stated, there are two elements to the advice of counsel defense. In addition to proving full disclosure, defendant must establish that his counsel specifically advised the course of conduct taken by the defendant. *McLennan*, 563 F.2d at 946. In this case, there was absolutely no evidence to suggest Mr. Gettleson advised the defendant not to pay his taxes in the years in

question. To the contrary, Mr. Gettleson expressly testified that he never advised defendant to take the course of conduct ultimately taken by defendant:

Government:	Did you tell Defendant that he should file his 1981 tax return and not make payment with it?
Gettleson:	No.
Government:	Did you tell him he should file his 1982 tax return and not make payment with it?
Gettleson:	No.
Government:	Did you tell him he should file his 1983 tax return and not make payment with it?
Gettleson:	No.
Government:	Did you tell him he should file his 1984 tax return and not make payment with it?
Gettleson:	No.
Government:	Did you tell him he should file his 1985 tax return and not make payment with it?
Gettleson:	No.
Government:	Did you tell him he should file his 1986 tax return and not make payment with it?
Gettleson:	No.

Gettleson Transcript, pp. 29-30. There being no evidence to satisfy the course of conduct element of the advice of counsel defense, any error committed by this Court with

respect to the full disclosure element is necessarily harmless error. Thus, the Court finds that defendant's first claim of error does not raise a substantial question of law likely to result in reversal or an order for a new trial.[4]

Second, defendant submits the Court erred by allowing the Government to inquire on cross-examination whether Marvin Smith timely filed tax returns or paid estimated income taxes while associated with defendant in the practice of law. Mr. Smith testified on direct examination that defendant's law firm was a partnership. This issue of partnership related to the evasion of payment felony charges. This issue was hotly contested at trial. Before taking the witness stand, the Government informed Mr. Smith that he was the subject of a Grand Jury investigation relating to charges similar to those for which the defendant was on trial. The Court allowed the Government to cross-examine Marvin Smith on the issue of his personal tax payments and filings because it was extremely probative of Mr. Smith's truthfulness or lack of truthfulness. Certainly, if Mr. Smith could be charged with violating laws similar to those for which defendant was on trial, he would most certainly have a motive to be untruthful. Given the overwhelming potential for bias, the Court found at trial, and still finds today, that the inquiry by the Government on cross-examination of Mr. Smith concerned Mr. Smith's character for truthfulness or untruthfulness and was, therefore, properly admitted into evidence.[5]

Finally, defendant argues the Court erred by admitting evidence of matters relating to "luxury" expenditures by the defendant. Defendant was charged with evading the payment of taxes by placing his money

beyond the reach of the IRS. Defendant was alleged to have accomplished his goal, in part, by purchasing assets and titling the assets to persons other than himself. Thus, purchases of expensive goods which were titled to persons related to the defendant were extremely relevant. Any prejudice resulting therefrom did not substantially outweigh the probative value of the evidence. Accordingly, the evidence was properly admitted pursuant to Federal Rule of Evidence 403.[6]

Having found that defendant will not raise a substantial issue on appeal that is likely to result in reversal of his conviction, this Court must, pursuant to the Bail Reform Act, deny bond pending appeal. Notwithstanding the clear language of the Bail Reform Act, defendant urges the Court to follow *U.S. v. McManus*, 651 F.Supp. 382 *aff'd.* 826 F.2d 1061, (4th Cir. 1987) *cert. denied* ___ U.S. ___, 108 S. Ct. 784 (1988). In *McManus* the district court held that, contrary to the clear language of the Bail Reform Act, extenuating circumstances may create an exception to the requirement that defendant show a substantial question of law on the appeal. In *McManus*, the court received an unprecedented outpouring of support for defendant in the form of letters. In addition, the court noted defendant donated much of his time and resources to charitable organizations. Further, defendant devoted himself to his physically impaired wife. Based on these "extenuating circumstances" the court granted bond pending appeal despite defendant's failure to raise a substantial question of law on appeal. In *McManus*, defendant was charged with evasion of taxes and filing false tax returns. Contrary to defendant's contention, the

nature of the crime played no role in the court's decision to grant bond.

McManus must be rejected for three reasons. First, it is a district court opinion out of the Fourth Circuit. It has no precedential value to this court. Second, the *McManus* holding is contrary to the plain language of the Bail Reform Act. Third, no "extenuating circumstances" exist in this case. Although defendant is an extremely successful attorney in this community, he has admittedly witheld [sic] payment of his taxes and, since his trial, he has shown no remorse nor made any attempt to satisfy his tax liability.

CONCLUSION

For the reasons set forth in this Opinion, defendant's motion for bond pending appeal is DENIED.

IT IS SO ORDERED.

/s/ L P Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

FOOTNOTES

[1] Defendant's family and law practice are located in this community. Defendant has no criminal record. Without question, defendant is not likely to flee and defendant does not pose a danger to the community.

[2] The advice of counsel defense consists of two elements: (1) full disclosure by the defendant of all relevant and pertinent facts; and (2) proof that counsel specifically advised the

course of conduct taken by the defendant. *See U.S. v. McLennan*, 563 F.2d 943, 947 (9th Cir. 1977); *see also U.S. v. Duncan*, 850 F.2d 1104, 116 (6th Cir. 1988).

[3] Defendant's entire argument addresses only the Court's finding that the proferred [sic] testimony called for a hearsay response. The Court also found the proffered testimony irrelevant because it called for testimony regarding the time period of 1979-1980, a period not relevant to the charges of willful non-payment of taxes commencing in 1982.

[4] Defendant asserted during oral argument of this motion that the Court erred by stating in the presence of the jury that "there are other ways for defendant to get into evidence the statements which the Court precluded during the Gettleson testimony." Defendant submits that any comment to this effect made in the presence of the jury is reversible error.

This Court does not recall ever making such a comment in the presence of the jury. The Court has read and reviewed the transcript of the Gettleson testimony and no such comment is contained therein. In the absence of any specific evidence that this comment was made, the Court is unable to evaluate defendant's claim of error.

[5] Assuming arguendo the Court erred in allowing the Government to inquire into Mr. Smith's personal tax history, there is no question but that the error was harmless. Mr. Smith testified that the law firm was a partnership. The issue of whether defendant's law firm was a partnership was relevant only to the felony charge of obstruction of the administration of the Internal Revenue Code, 26 U.S.C. §7212(a). Defendant was acquitted on this charge. Mr. Smith's testimony and the Government's impeachment of Mr. Smith was not relevant to the charges upon which defendant was convicted.

[6] This Court notes that evidence of luxury expenditures wherein the asset purchased was titled solely in the name of defendant Elbert Hatchett was not admitted into evidence. Only expenditures which resulted in the purchase of assets that were beyond the reach of the Internal Revenue Service were admitted into evidence.

No. 89-1679

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ELBERT L. HATCHETT, Defendant-Appellant	)	ORDER (Filed Feb. 8, 1991)

BEFORE: JONES and BOGGS, Circuit Judges; and GIBBONS*, United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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*Hon. Julia S. Gibbons sitting by designation from the Western District of Tennessee

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

ALBERT L. HATCHETT and LAURESTINE HATCHETT,

Defendants.

_____/

CRIMINAL NO. 88-80736
VIO: 26 U.S.C. §§7201, 7206(4), 7203, 7212
18 U.S.C. §2(a)

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

(26 U.S.C. §7201; 18 U.S.C. §2(A) – EVASION OF THE PAYMENT OF TAX)

1. ELBERT L. HATCHETT, defendant herein, while a resident of the Eastern District of Michigan, mailed or caused to be failed his Forms 1040, United States Individual Income Tax Returns, to the Cincinnati Service Center of the Internal Revenue Service in Cincinnati, Ohio as follows:

Tax Year	Date Filed	Taxable Income	Tax Due
1978	April 17, 1980	$ 85,402.00	$ 44,134.00
1979	April 15, 1980	75,842.00	38,266.00
1980	April 21, 1982	169,711.00	96,359.00
1981	April 15, 1982	298,344.00	189,207.00
*1981	December 8, 1982	304,244.00	193,338.00
1982	March 7, 1984	204,767.00	98,789.00

Tax Year	Date Filed	Taxable Income	Tax Due
1983	April 15, 1985	694,266.00	336,799.00
1984	April 15, 1985	255,147.00	132,145.00
1985	April 17, 1987	326,734.00	58,360.00
*1985	April 11, 1988	498,377.00	244,183.00
1986	April 11, 1988	401,137.00	195,699.00
	TOTAL:	$2,688,893.00	$1,279,712.00

*amended

2. Income taxes due and owing from ELBERT L. HATCHETT, defendant herein, to the United States of America, were assessed by the Internal Revenue Service, as required by law, as follows:

TAX YEAR	DATE OF ASSESSMENT	TAX ASSESSED
1978	May 26, 1980	$ 44,134.00
1979	May 19, 1980	38,266.00
1980	June 7, 1982	96,252.00
1981	June 7, 1982	186,855.47
*1981	May 2, 1983	190,883.00
1982	May 7, 1984	98,789.00
1983	October 21, 1985	336,799.00
1984	September 9, 1985	107,194.50
1985	June 8, 1987	158,360.00
*1985	July 25, 1988	85,823.00
1986	June 27, 1988	195,376.25
	TOTAL:	$1,351,877.22

*amended

3. ELBERT L. HATCHETT, defendant herein, did not remit any amount of the income taxes due and owing with his Forms 1040, Individual Income Tax Returns as specified in paragraph one (1) above.

4. From at least on or about March 14, 1983, and continuing thereafter up to and including the date of this

indictment, within the Eastern District of Michigan, and elsewhere, ELBERT L. HATCHETT and LAURESTINE HATCHETT, defendants herein, did knowingly, willfully, and unlawfully attempt to evade and defeat the payment of a large part of the income taxes due and owing by ELBERT L. HATCHETT, defendant herein, to the United States of America for the calendar years 1978 through 1985, by various means, including but not limited to:

(a) Concealing and attempting to conceal the disposition of legal fees paid by check to ELBERT L. HATCHETT, in the approximate amounts of $500,232.00 received on or about March 17, 1983, $500,000.00 received on or about April 15, 1983, and $78,900.00 received on or about March 7, 1984, by not depositing said legal fees to any bank account but by negotiating the checks, and using the proceeds to purchase cashier's checks, for the purpose of preventing the Internal Revenue Service from attaching said proceeds by legal process in order to satisfy taxes due and owing by ELBERT L. HATCHETT, defendant herein, to the United States of America:

(b) Concealing and attempting to conceal the ownership interest of ELBERT L. HATCHETT in legal fees arising out of law suits filed in the Circuit Court of Oakland County, Michigan, on which the Internal Revenue Service had served Notices of levy, by falsely claiming that said fees were not payable to ELBERT L. HATCHETT, and by falsely denying that ELBERT L. HATCHETT would receive any portion of said fees, in order to prevent the Internal Revenue Service from receiving said fees in satisfaction of a portion of the taxes due and owing

by ELBERT L. HATCHETT, defendant herein, to the United States of America;

(c) Concealing and attempting to conceal from the Internal Revenue Service the ownership interest of ELBERT L. HATCHETT, defendant herein, in real property located at 160 W. Huron, Pontiac, Michigan, and 592 Orchard Lake Road, Pontiac, Michigan, purchased on or about January 3, 1986 for $625,000, with a $100,000 down payment, by using the name of LAURESTINE HATCHETT, defendant herein, as owner of said real estate, all for the purpose of preventing the detection, seizure, and sale of said real estate by the Internal Revenue Service to satisfy a portion of the taxes due and owing by ELBERT L. HATCHETT, defendant herein, to the United States of America; and

(d) Concealing and attempting to conceal the ownership interest of ELBERT L. HATCHETT in a 1987 Rolls Royce Corniche II automobile, purchased on or about March 24, 1987 for $153,491.36, by using the name of LAURESTINE HATCHETT, defendant herein, as owner of said automobile, all for the purpose of preventing the detection, seizure, and sale of said automobile by the Internal Revenue Service to satisfy a portion of the taxes due and owing by ELBERT L. HATCHETT, defendant herein, to the United States of America;

In violation of Title 26, United States Code, §7201, and Title 18, United States Code, §2(a).

COUNT TWO

(26 U.S.C. §7212(a) – OBSTRUCTION OF TAX COLLECTION)

1. Paragraphs one (1) through three (3) of Count One of this Indictment are realleged and incorporated as though set forth in full herein.

2. On or about June 28, 1984, in the Eastern District of Michigan, ELBERT L. HATCHETT, defendant herein, who was a resident of Bloomfield Hills, Michigan, did corruptly endeavor to obstruct or impede the due administration of the Internal Revenue Code, by causing letters to be sent falsely claiming that a partnership and not ELBERT L. HATCHETT, had the right to receive any money or other obligation due to ELBERT L. HATCHETT, defendant herein, knowing that the persons to whom the letters were sent had been served with Notices of levy requiring payment to the Internal Revenue Service of all money or other obligations due to ELBERT L. HATCHETT, defendant herein, in order to satisfy a portion of the tax liability due and owing by ELBERT L. HATCHETT to the United States of America as specified in paragraph one (1) above;

In violation of Title 26, United States Code, §7212(a).

COUNT THREE

(26 U.S.C. §7206(4) – CONCEALMENT OF PROPERTY SUBJECT TO LEVY)

1. Paragraphs one (1) through three (3) of Count One of this Indictment are realleged and incorporated as though set forth in full herein.

2. On or about January 6, 1987, in the Eastern District of Michigan, ELBERT L. HATCHETT, defendant herein, who was a resident of Bloomfield Hills, Michigan, with intent to evade and defeat the collection of income taxes assessed against him by the Internal Revenue Service as specified in paragraph one (1) above, did knowingly and unlawfully remove and conceal a legal fee in the approximate amount of $33,000.00, upon which levy was authorized by Section 6331 of the Internal Revenue Code;

In violation of Title 26, United States Code. §7206(4).

COUNT FOUR

(26 U.S.C. §7203 – FAILURE TO PAY INCOME TAX)

During the calendar year 1982, ELBERT L. HATCHETT, defendant herein, who was a resident of Bloomfield Hills, Michigan, had and received taxable income of $204,767.00, on which taxable income there was owing to the United States of America an income tax of $98,789.00; defendant was required by law to pay said income tax on or before April 15, 1983 to District Director of the Internal Revenue Service, to said Director of the Internal Revenue Service Center, or to any other proper officer of the United States;

In violation of Title 26, United States Code, §7203.

COUNT SIX

(26 U.S.C. §7203 – FAILURE TO PAY INCOME TAX)

During the calendar year 1984, ELBERT L. HATCHETT, defendant herein, who was a resident of Bloomfield Hills, Michigan, had and received taxable income of $255,147.00, on which taxable income there was owing to the United States of America an income tax of $107,194.50; defendant was required by law to pay said income tax on or before April 15, 1985 to the District Director of the Internal Revenue Service for the Internal Revenue District of Detroit, Michigan, in the Eastern District of Michigan, or to the Director, Internal Revenue Service Center at Cincinnati, Ohio, or other proper officer of the United States; and well knowing and believing all of the foregoing, ELBERT L. HATCHETT, defendant herein, did willfully fail to pay the said income tax to said District Director of the Internal Revenue Service, to said Director of the Internal Revenue Service Center, or to any other proper officer of the United States;

In violation of Title 26, United States Code, §7203.

COUNT SEVEN

(26 U.S.C. §7203 – FAILURE TO PAY INCOME TAX)

During the calendar year 1985, ELBERT L. HATCHETT, defendant herein, who was a resident of Bloomfield Hills, Michigan, had and received taxable income of $498,377.00, on which taxable income there was owing to the United States of America an income tax of $244,183.00; defendant was required by law to pay said

income tax on or before April 15, 1986 to the District Director of the Internal Revenue Service for the Internal Revenue District of Detroit, Michigan, in the Eastern District of Michigan, or to the Director, Internal Revenue Service Center at Cincinnati, Ohio, or other proper officer of the United States; and well knowing and believing all of the foregoing, ELBERT L. HATCHETT, defendant herein, did willfully fail to pay a substantial portion of said income tax to said District Director of the Internal Revenue Service, to said Director of the Internal Revenue Service Center, or to any other proper officer of the United States;

In violation of Title 26, United States Code, §7203.

COUNT EIGHT

(26 U.S.C. §7203 – FAILURE TO PAY INCOME TAX)

During the calendar year 1986, ELBERT L. HATCHETT, defendant herein, who was a resident of Bloomfield Hills, Michigan, had and received taxable income of $401,137.00, on which taxable income there was owing to the United States of America an income tax of $195,376.25; defendant was required by law to pay said income tax on or before April 15, 1987 to the District Director of the Internal Revenue Service for the Internal Revenue District of Detroit, Michigan, in the Eastern District of Michigan, or to the Director, Internal Revenue Service Center at Cincinnati, Ohio, or other proper officer of the United States; and well knowing and believing all of the foregoing, ELBERT L. HATCHETT, defendant herein, did willfully fail to pay the said income tax to said

District Director of the Internal Revenue Service, to said Director of the Internal Revenue Service Center, or to any other proper officer of the United States;

In violation of Title 26, United States Code, §7203.

THIS IS A TRUE BILL

/s/ Illegible
FOREPERSON

ROY C. HAYES
United States Attorney

/s/ M. Susan Murnane
M. SUSAN MURNANE
Assistant United States Attorney

Dated: 10/28/88

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No.
88-CR 80736 DT

ELBERT L. HATCHET and
LAURESTINE HATCHETT,

VOLUME 14

Defendants.
_____/

JURY TRIAL

Proceedings had in the above-entitled cause, before the Honorable Lawrence P. Zatkoff, and a jury, on March 21, 1989.

APPEARANCES:

On Behalf of Plaintiff
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On Behalf of Elbert Hatchett
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and
ELBERT HATCHETT

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(313) 540-5687

FRANKLIN D. GETTLESON,

[p. 119] called on behalf of Defendant, was sworn at 12:05 p.m.

THE COURT: Please come around and have a seat and please keep your voice up.

DIRECT EXAMINATION

MS. MOREY:

Q. Would you please state your name and spell your last name for the record?

A. Franklin D. Gettleson, G-e-t-t-l-e-s-o-n.

Q. Are you presently employed, Mr. Gettleson?

A. I'm a practicing attorney.

Q. Where do you practice?

A. I have a – my practice is in Birmingham, Michigan under the name of Franklin D. Gettleson, P.C.

Q. Could you explain your education?

A. I have a Bachelor of Science in accounting and economics from Wayne State University. I have a law degree from Detroit College of Law. I'm a certified public accountant in the State of Michigan and a practicing attorney licensed to practice in the State of Michigan.

Q. Prior to practicing as an attorney in the State of Michigan, were you engaged in an accounting practice?

A. Yes, I was.

Q. Could you explain the time period in which you were engaged in this accounting practice?

[p. 120] A. I was working for a CPA firm in Detroit by name of Denhart, Hanrahan and Carey, I started with them part time when I was going to college. When I graduated from college, I began working for them full-time. I stayed with them for six years from 1960 until 1966. In 1966, I left and opened my own accounting practice. I practiced accounting until the early seventies. I was admitted to the bar in 1969 and at that time I was still practicing accounting. I practiced for another couple of years and I began practicing law.

Q. Can you explain what your accounting practice consisted of?

A. Yes. My accounting practice was comprised of several individual and business accounts for which I did the monthly or annual records. I did some certified auditing. I did tax returns naturally for all those clients and I did tax returns for other non-business clients.

Q. Do you know Mr. Elbert Hatchett?

A. Yes, I do.

Q. How do you know Mr. Hatchett?

A. I've known Elbert Hatchett for 40 years. We were kids together. We went – I've known Elbert since the seventh grade. We have known each other in high school and known each other over the years.

Q. You continued your friendship after you finished law school and began practicing?

[p. 121] A. Yes, we did.

Q. Have you maintained a professional relationship with Mr. Hatchett since you received your law degree?

A. Yes, I have.

Q. In that capacity have you had occasion to try cases with Mr. Hatchett?

A. Yes, I have.

Q. Did there come a time when Mr. Hatchett consulted with you regarding some tax problems he was having with the Internal Revenue Service?

A. Yes, there was a time. I knew of the tax problems and I discussed them intermittently with him several, several times.

Q. Can you explain approximately when there initial conversations occurred?

A. These go back into the seventies, late seventies he was having problems.

Q. Now, when you say you discussed them on a number of occasions, you mean you discussed the dispute of a tax generally or were there specific disputes for which you were consulted?

A. Well, we had some – several, several discussions because I knew of the ongoing problem and it was, I believe at that time, it was in the papers and I had known about them because Elbert and I would get together periodically, we would have lunch together, I would stop by his office and we would see [p. 122] each other periodically. And then in late 1979, early 1980, he contacted me with some specific problems.

Q. When he contacted you with the specific problem, could you explain to the members of the jury what the problem consisted of?

A. Well, he owed a substantial amount of tax at that time and he wanted – I knew that and we discussed specifically a manner of liquidating the liability.

Q. By "liquidating the liability," do you mean the manner in which the tax liability would be paid off?

A. Yes.

Q. And did he consult your advice as to how he should pay off the tax liability?

A. Yes, he did.

Q. And in consulting with you, did he advise you as to any of the specifics regarding his tax liability, for example, the amount owed and how the amount had occurred?

A. Yes, he did.

Q. Could you tell the members of the jury what he told you in those conversations in early –

MS. MURNANE: Objection, Your Honor, hearsay and relevance.

MS. MOREY: Your Honor, it is not offered for the truth of the matter asserted, but it is offered to show Mr. Hatchett's reasoning for consulting this gentleman in obtaining [p. 123] the advice which he obtained.

MS. MURNANE: I think she can ask him what advice he gave, what – the question called precisely for an out-of-court statement, Your Honor, I submit it is hearsay and we are talking along 1979, 1980, I don't perceive the relevance.

THE COURT: It is hearsay, isn't it?

MS. MOREY: Your Honor, it is hearsay, however, with respect to the advice of counsel defense, the jury is entitled to determine whether pertinent facts were properly disclosed to the attorney and whether he relied upon those disclosures in giving the advice, therefore, it is a necessary part of his testimony in order for the jury to evaluate it.

MS. MURNANE: Your Honor, I don't believe – we are talking about 1979, 1980. The indictment charges an attempt to evade from commencing 1983 and ongoing. I don't believe a proper foundation has been laid for that. I believe it is too far removed from the time frame of the indictment for reliance on counsel at that time to be an appropriate predicate for the hearsay.

MS. MOREY: The indictment charges failure to pay beginning with the 1982 calendar year this witness has testified he had several discussions with Mr. Hatchett beginning in the late 1970 to early 1980 period and they don't consult thereafter. Therefore it is probative as to the issue [p. 124] of willfulness and disclosures are necessary not for the truth of the matter asserted but for purposes of the jury evaluating the advice.

THE COURT: You didn't ask him the advice he gave, you asked him a different question. If you want to ask him what advice he gave, it may not elicit an objection. You're asking him what the Defendant said to him.

MS. MOREY: I submit we are not offering it for the truth of the matter asserted but under the *Davenport* decision with which the jury must make determinations

as to whether the person seeking the legal advice made appropriate disclosures.

MS. MURNANE: Your Honor. – I'm sorry, Your Honor.

THE COURT: Go ahead.

MS. MURNANE: Your Honor, the indictment alleges an offense in 1983, the offense – yes, the tax goes back to 1978, but the conduct in 1978 is not material to whether or not a willful attempt to evade occurred commencing in 1983. The statement what advice this person gave in 1980 cannot constitute a reliance on advice of counsel defense for conduct in 1983 and the Government objects to the hearsay statement in 1979 and 1980.

MS. MOREY: Your Honor, we believe it can constitute a basis for willfulness and this jury's [p. 125] determination as to whether there was willfulness with respect to the failure to pay. Not only will his testimony allude to disclosures made in 1980 but it will concern advice given in 1980 and forward.

THE COURT: Have you furnished the Court with a brief on the *Davenport* decision?

MS. MOREY: No. We have prepared it in a jury instruction that we have tendered to the Court today.

THE COURT: I'm sustaining the objection.

MS. MOREY: Will the Court reconsider whether these questions as to the disclosures are appropriate after I've had an opportunity to review our jury instruction and the *Davenport* decision.

THE COURT: I'll look at anything you wish to submit counsel.

Q. (By Ms. Morey) Did you in fact give advice to Mr. Hatchett concerning the tax issue that he had discussed with you during the 1980 period?

A. Yes.

Q. What advice did you give?

A. Well, I felt that the best thing he could do was to file the tax returns which were then due and to wait and pay the tax at such time he was able to resolve all of the problems he was having because he tried to pay the tax and apparently met with some opposition in that regard.

[p. 126] Q. Did you have any discussions as to the method of payment of the tax liability?

A. Well, he couldn't pay it all at one time and it was a fair amount of money at that time and he was going to try and make some orderly payments.

Q. Approximately what amount of money was alleged to have been due and owing to the IRS at the time of your initial conversations?

A. At the time of that conversation, probably one hundred seventy-five to two hundred thousand, something in that area. It was a substantial amount of money.

Q. In connection with the advice that you gave Mr. Hatchett, did you obtain any information concerning his prior audits by IRS?

A. Oh, yes, I knew he had been audited incessantly prior to that time. In fact I think there was a deficiency

for three years that he had at that time and he had a couple of tax returns he was about to file.

Q. Do you recall exactly which returns those were?

A. I think they were 1978 and 1979.

Q. Did you have an occasion to discuss the effect of the advice you've given, that is, is it your recommendation he should file returns but not remit payments with those returns?

A. By "effect," I'm not sure. Was the IRS receptive?

Q. Penalties and interest?

[p. 127] A. Yes, he did discuss that. I explained to him it would be expensive in terms of interest and penalties. I further explained to him that the interest would be deductible when he paid it and there would be some relief in that regard but that it would cost substantially, substantially more to defer the payment.

Q. Do you know whether Mr. Hatchett followed your advice?

A. I believe he did.

Q. Did you have occasions to have subsequent conversations with him concerning whether he was able to work out an installment payment plan with the IRS?

A. Yes.

MS. MURNANE: Objection, Your Honor, may we have a time frame, foundation for the question.

MS. MOREY: The question was subsequent, the witness answers yes. I will ask when.

MS. MURNANE: Thank you.

MS. MOREY: Your welcome.

Q. (By Ms. Morey) When did you later have discussions regarding your request for installment payment plans?

A. Well, you have to understand that Elbert and I are friends, I've known Elbert for 40 years. We kind of communicate sometimes on a weekly basis, sometimes on a monthly basis. There were several conversations that took place both before and after that. So any time I saw him I asked him how [p. 128] things are going, have you been able to resolve anything and the conversations were kind of ongoing.

Q. Did you have conversations at a later time in which you were made aware that Mr. Hatchett had in fact made payments with his income tax return?

A. I don't know with certainty. I knew that he had made payments, he had made some payments along the way, yes, I did know that.

Q. But these were at times at other than when he filed the tax returns?

A. I believe so, yes.

Q. Did you have any information concerning the reasons for the making of those payments?

MS. MURNANE: Objection, Your Honor, foundation. This witness is not making the payments. I believe it calls for a hearsay response.

MS. MOREY: I'll restate the question.

THE COURT: You may.

Q. (By Ms. Morey) During the occasions which you later discussed whether Mr. Hatchett had had any success with respect to obtaining an installment payment agreement with the IRS, did you ever discuss with him the compromising of the tax liability that was due?

A. I think we discussed a payment schedule more than we did a compromising. Because I knew that the IRS was –

[p. 129] MS. MURNANE: Objection, Your Honor it is hearsay, the witness is testifying to hearsay.

THE COURT: Well, Ms. Morey.

MS. MOREY: I asked the witness if he discussed with Mr. Hatchett the payment plan and whether there were discussions regarding compromise.

THE COURT: He said yes.

Q. (By Ms. Morey) Could you explain what advice, if any, you gave with regard to whether the tax liability should be compromised or paid on an installment payment plan?

A. I don't think there was an opportunity for compromise, there was no opportunity to pay on a payment plan either. There was no possibility that he was able to work out that I was ever made aware of with regard to paying the taxes.

Q. Did there come a later time when you had occasion to discuss the fact that he would no longer be able to deduct the interest on the tax liability?

A. Well, the current law is such that the full interest is not deductible any longer.

Q. Do you recall when you had a conversation regarding the changes in the income tax laws as it relates to the deductibility of interest?

A. Probably in the last year or two as the laws are changing.

Q. And when you gave Mr. Hatchett the legal advice to file returns without remitting payment, what was your reason on [p. 130] giving that advice?

MS. MURNANE: Objection, Your Honor. That calls for, first of all, it calls for a legal analysis for the jury and I don't believe that it is appropriate to do so through this witness. I don't believe it is appropriate to ask him to give his reasons for giving particular advice. It is pure opinion, Your Honor.

THE COURT: Well, what's the objection?

MS. MURNANE: That its opinion, Your Honor, it is an improper opinion.

THE COURT: How do you know it it's improper if you haven't heard it yet? He's here to be cross-examined. You can ask him on cross-examination and determine whether his opinion is proper or not.

Q. (By Ms. Morey) Could you explain your reasoning underlying your advice that he should file returns without submitting payment with those returns?

A. I knew that Elbert wanted to pay the tax, I knew that he had tried to pay the tax. I knew that it was very

concerning to him. We discussed the payment of the tax in some orderly fashion and we also discussed, he was concerned if there would be any other ramifications, such as criminal ramifications, that may befall him. And I did some research back at that time and I was confident in the research that I did, based upon the statute and based upon the case law that I found as a result of [p. 131] that research, that the position he had taken was a sound position and I told him as much. And I based it in part on the case of –

MS. MURNANE: Objection, Your Honor, getting into specific legal argument in front of the jury is improper.

THE COURT: I think that is correct.

MS. MOREY: Your Honor, we would submit that one of the determinations that the jury must make with respect to the advice of counsel defense is the soundness of counsel's advice and therefore he should be permitted to testify as to what things he relied upon in giving the advice that he gave.

MS. MURNANE: Your honor, specific case law is confusing to the jury, it has no meaning. First of all, we have not – and it invades the province of the Court, it invites a legal argument in front of the jury as to the criteria for which the opinion was based.

The elements of the advice of counsel defense are an attorney-client relationship, full disclosure of all pertinent facts, advice given and actual reliance on the advice. Precise discussion of case law is not necessary to that, it is not relevant to that, and it is confusing before the jury.

MS. MOREY: Your Honor, we do not believe it would be confusing because this Court will ultimately instruct the jury on the issues as they relate to this indictment and [p. 132] the law that they should apply. However, in order for the jury to make a determination as to whether the advice that the counsel gave is sound advice, even if it's legally incorrect, they should be allowed to hear the testimony of the witness concerning the things on which he relied.

THE COURT: He can state things on which he relied in general without going into any specifics. I think he's done that.

Q. (By Ms. Morey) did you have any discussions with Mr. Hatchett regarding whether in fact an installment payment plan would be more than likely to be a possible result of his request if the IRS reduced their claims to judgment?

A. Yes, I did, because I felt if they reduced their claim to judgment a district judge would have to look reasonably on a payment plan.

Q. And were your discussions regarding the reducing of the claim to judgment part of the discussions you had in the early 1980 time frame?

A. Yes.

Q. Could you explain what you mean when you say "reduce the claim to judgment"?

A. Well, if they pursued him civilly by suing him for the taxes, the claim would, ultimately, be reduced to judgment by the court.

Q. And it was your understanding that a court could be more [p.133] reasonable in affording a payment plan than the IRS?

MS. MURNANE: Objection, Your Honor. His opinion is not relevant.

WITNESS: Yes.

MS. MOREY: Your Honor, his entire testimony is based upon his opinion and legal advice he gave to Mr. Hatchett.

THE COURT: I think it is in this instance. You may proceed.

Q. (By Ms. Morey) Was it your opinion, if the claim were reduced to judgment, a judge would be more reasonable in affording an installment payment plan than the IRS?

A. Absolutely, because the IRS had absolutely refused any proposal he had made.

Q. Had you had occasion to receive correspondence in which Mr. Hatchett had requested these payment plans with the IRS?

A. Yes.

Q. Did there come a time when Mr. Hatchett consulted you about appearing at a meeting with the Internal Revenue Service representative as a result of having received a summons?

A. Yes.

Q. Did you in fact appear at that meeting?

A. No. Something happened in my scheduling. I could not be there, I had a discussion with Elbert. This was with the collection department of the IRS at that time and I told him to [p. 134] take and discuss what they were asking for, I said take what they wanted and go down and display to them the things that they were looking for, there was nothing offensive to me that they had sought.

Q. Do you recall what the collection summons requested?

A. A multitude of documents, information. I don't recall specifically, but there was the material that would allow them to seek collection.

Q. Did you have discussions with Ms. Hatchett following that meeting which he was summoned to bring all the documents?

A. Discussions following? Yes.

Q. Did you have any understanding as to whether there were any further collection summons or requests outstanding by IRS after that meeting? Were you ever asked to accompany him to any further meetings?

A. No.

Q. So it was your understanding that your assistance was not needed any further with respect to the IRS summons?

A. That's correct. I thought he had taken everything they had wanted at that time.

MS. MOREY: No further questions of this witness.

THE COURT: Ms. Murnane?

CROSS EXAMINATION

BY MS. MURNANE:

[p. 135] Q. Mr. Gettleson, you're a long time personal friend of Defendant, aren't you?

A. Yes.

Q. Now, in the early 1980's, when Defendant first sought your advice about his tax problems, did he retain you as an attorney?

A. By "retained," did he pay me?

Q. Yes.

A. No.

Q. Did you establish an attorney-client relationship at that time?

A. I believe I did.

Q. But he did not pay you anything?

A. Nor would I have asked him for anything. We were kids together, that wasn't the type of relationship that we had, nor is it today.

Q. Now, at what point in time did he seek your legal advice to his problem with collection, was it in 1980?

A. With regard to collection?

Q. Or was it in 1981, this initial time?

A. The specific problem I think was in 1979, end of '79, early '80.

Q. Okay. And do you recall what year's taxes were in audit at that time? You just said there were some years that were in dispute, in audit, at that time.

[p. 136] A. I think at that time there was '75, '76 and '77 and I think they had just finished auditing; and '78, '79 was not yet filed, as I recall.

Q. So '78 and '79 had not yet been filed.

Now, isn't it true that Defendant had an installment payment program in 1978?

A. In 1978?

Q. Isn't it true he had been on an installment payment program in 1978?

MS. MOREY: Objection, lack of foundation. You can ask the witness if he was aware of the audit or outcomes of the audit.

MS. MURNANE: The question has nothing to do with the audits.

THE COURT: This is an appropriate question.

Q. (By Ms. Murnane) Isn't it true that Defendant was on an installment payment program in 1978?

A. When he consulted with me, I don't believe he was on an installment program.

Q. Did you know that he had been on an installment payment program in 1978?

A. There were times, I can't tell you the specific times, there were times when he had attempted, I know, to resolve this by making some small payments and I

think there were some small payments made, but there were some times.

[p. 137] Q. When he consulted you in 1979, 1980, did you know he had a signed formal installment payment program with the IRS in 1978.

MS. MOREY: Objection, asked and answered.

THE COURT: This is cross-examination.

Q. (By Ms. Murnane) Did you know that?

A. I don't recall seeing a formal installment payment program, so I can't answer that.

Q. Okay. Did you know that that formal installment payment program had ceased because Defendant was bouncing checks?

MS. MOREY: Objection, Your Honor, this witness has testified he didn't know there was an installment payment program. She is continuing to ask him questions about the payment plan that he's testified he didn't know of.

THE COURT: Ms. Murnane.

MS. MURNANE: This is cross-examination, Your Honor. He's saying he's given him legal advice. We are allowed to inquire into the circumstances of the event. This is cross-examination, Your Honor.

THE COURT: I'm going to permit the question.

WITNESS: Would you repeat the question?

Q. (By Ms. Murnane) Did you know at the very end of 1978 that installment payment program was stopped because Defendant was bouncing checks?

A. At the end of 1978?

Q. Yes.

Law Firm of

Hatchett, DeWalt, Hatchett,
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483 Orchard Lake Ave.

Pontiac, Mich. 48053

Federal 4-1387

Elbert L. Hatchett
Willie E. DeWalt
William M. Hatchett
Darryl G. Mitchell
Richard H. Morgan, Jr.
Cyril C. Hall
Marvin R. Smith
Leland Prince

Willie E. DeWalt
10-8-37 to 12-4-81

March 17, 1983

Internal Revenue Service
140 South Saginaw Street
Suite 205
Pontiac, Michigan 48058

ATTENTION: Mrs. Cummings

Dear Mrs. Cummings:

Would you please furnish me with an up-to-date statement of what you claim is owing as well as an indication of your position regarding payment. Although I had indicated that I would make no further overtures in this regard, I do wish to resolve this matter on an amicable basis, if at all possible.

Of course, I am aware, and have been for some time, of your so-called investigation and all of the options that you may choose to pursue in that regard. I wish to

adamantly, however, affirm that there is absolutely nothing to be discovered in any such investigation, except a dispute regarding the tax liability.

You are further advised that I must continue, pursuant to advise [sic] of my counsel and my accountant, to withhold any further payment until the matter has been resolved.

You have the prerogative of choosing the forum. I urge you to do so in order that the matter can be brought to a conclusion. Alternatively, why don't we just sit down and try to resolve the matter.

Very truly yours,

/s/ Elbert L. Hatchett
Elbert L. Hatchett

ELH/gt

Law Firm of
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483 Orchard Lake Ave.
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Federal 4-1387

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Leland Prince
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Ronald McDuffie
Gail P. Carr

Willie E. DeWalt
10-8-37 to 12-4-81

August 14, 1984

Mr. Charles A. Parks
District Director
Internal Revenue Service
477 Michigan Avenue
Detroit, Michigan 48226

RE: Tax-payer: Elbert L. Hatchett

Dear Mr. Parks:

Although your letter of August 10, 1984, did not require a response, I nevertheless felt obliged to do so just for the record.

I was quite disturbed to note from your letter the apparent lack of full disclosure on the part of Ms. Gibson and Mr. Owozarek in reporting to you what transpired during our meeting of July 13, 1984, pursuant to the Summons. At that conference, which lasted approximately two hours, in addition to bringing cancelled checks, etc., as required by the Summons, I forthrightly disclosed to the interviewing agents all of my assets. I further responded to all of their inquiries relating thereto with utmost candor. They were apprised of my recorded interest in the following properties: 285 W. Hickory Grove, Bloomfield Hills, Michigan; 82 Franklin Blvd., Pontiac, Michigan; 79 Bloomfield Blvd., Bloomfield Twp., Michigan; 352 S. Saginaw Street, Pontiac, Michigan; 6300 Cyclone Road, Otter Lake, Michigan; 3726 Otter Lake, Otter Lake, Michigan. Moreover, furnished answers to their inquiries regarding my interest in stocks, bonds, trusts and other liquid and/or unliquid assets.

It is no secret that my income is in excess of One Million Dollars per year. I suggested to them , however, that their persistent and unreasonable refusal to amicably resolve

the matter creates a serious question as to their true intentions.

I have suggested on prior occasions that they institute suit on all of the claims and whatever a judge determines that I owe, I will gladly pay. They have, of course, steadfastly refused to do this, except as to years in which the statute of limitations was about to run. They obviously seem to enjoy the use of other means of collecting the alleged amounts due.

I certainly don't want this letter to you to suggest any sensitivity on my part whatever to the agents' decision to attempt to collect the money on the street. The obvious ulterior motive of those efforts is to disrupt my practice. Time will reveal however that such an attitude is both niave [sic] and ineffective. Moreover, it requires me to assume a defensive posture that is clearly counter-productive to the goals of your agency.

You will eventually observe from my income tax return for the year 1984, that from the date that the hundreds of Notices of Levy were served on clients, defendants, defense counsel, etc., (July 14th) to present, I have earned $137,000.00 and they have collected nothing. You know and I know that it is impossible for them to collect the obligation on the street. They seem, however, to enjoy the cowboy activities involved, more-so than the realization of their objective. I have always felt that the place to resolve controversies is in the courtroom – not the street. I remain committed in my desire to achieve resolution in that time-honored way.

Very truly ours,

/s/ Elbert L. Hatchett

ELH/gt

cc: Ms. Christine Gibson✔
Mr. Joseph Owozarek

P.S. I don't owe $16,451.46 in withholdings. However, if I am in error all your agents have to do is provide me with the year and quarter in which the monies were not received. I will check them against our records and if you are right I will forthwith pay whatever amount is owing. Just tell them to send me the breakdown. For your further information, we are having problems right now receiving credit for withholdings which we are paying through the bank. Enclosed is the latest erroneous claim by IRS in that regard.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELBERT L. HATCHET [sic] and
LAURESTINE HATCHETT,

Defendants.
_____/

Case No.
88-CR 80736 DT

VOLUME 18

JURY TRIAL

Proceedings had in the above-entitled cause, before the Honorable Lawrence P. Zatkoff, and a jury, on March 27, 1989.

APPEARANCES:

On Behalf of Plaintiff
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On Behalf of Elbert Hatchett
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and
ELBERT HATCHETT

On Behalf of Laurestine Hatchett
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PAULA J. ALLARD
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Birmingham, MI 48009
(313) 540-2687

[p. 12] Does the Government have any objection to that?

MS. MURNANE: None, Your Honor.

THE COURT: Okay.

Other than defense proposed 59, do we have anything else we should put on the record with respect to the instructions? Does the Government need some time to discuss 59 or are you ready to discuss it.

MS. MURNANE: If I could have a moment. Yes, I would like a moment to address 59. May I consult my filing cabinet for five minutes?

THE COURT: Yes, we will take a five-minute recess.

MS. MURNANE: Thank you, Your Honor.

THE COURT: You may be seated.

(Recess held at 8:35 a.m. until 8:55 a.m.)

THE COURT: Okay. I've been furnished with the Government's proposed requested number 19.

Does the defense have any comment on that?

MR. COLEMAN: Yes, Your Honor. You'll recall during Mr. Gettleson's testimony Ms. Morey attempted to elicit testimony relative to the legal advice he gave to Mr. Hatchett. The Government objected, the Court sustained the objection. We have no objection to this statement being an accurate statement of the law we would object to the extent it has about disclosure the Court did not permit us to go into the area of [p. 13] that in the testimony of Mr. Gettleson.

THE COURT: Ms. Murnane.

MS. MURNANE: Full disclosure is one of the prerequisites for the defense.

MR. COLEMAN: I understand. We sought to develop that testimony but the Government objected to that testimony and at that time, we said we are offering it on that issue. There was an objection and the Court sustained it. We wanted to develop that, we were very much aware of that requirement but the Court did not permit us to develop that testimony with respect to Mr. Gettleson. We have no objection to this being an accurate statement of the law. It is a unique basis upon which this comes before the Court.

MS. MURNANE: Your Honor, I think Defendants were attempting to elicit substantial hearsay information at that time. I think they did get a sufficient factual basis in on what was disclosed, that the instruction may stand.

The Government feels that its submission number 19 is a much, much more even handed – is a much more balanced instruction than Defense 59. But if the Court feels the phrase and if you also find the Defendant in good faith supplied that attorney with a complete and accurate report of all the material facts related to the Defendants, the defense wish that sentence struck, the Government would have no objection.

THE COURT: Which sentence now?

[p. 14] MS. MURNANE: In the middle of 19, it reads and if you also find the Defendant in good faith supplied that attorney with a complete and accurate

report of all the material facts related to the Defendant's inquiry. So if you find the Defendant consulted with a competent attorney in order to ascertain the legality of the matters here involved, and if you also find the Defendant thereafter acted solely in accordance with the advice of his attorney, you may find that the Defendant did not act willfully in the violations charged.

However, I note that defense number 15 also includes –

THE COURT: 15 or 59?

MS. MURNANE: 59. Also includes a statement and acted strictly in accordance with the advice of his attorney following his full report. So both instructions include the requirement that Defendant supplied the attorney with full information.

THE COURT: I think full disclosure is a part of it. I'm going to give 19 as submitted without any deletions. I think that is a fair instruction. Does anybody wish to comment where we should put that in the instructions, where it should logically fit?

MS. MURNANE: It seems to me that perhaps it would fit after the specific intent instruction, the specific intent instruction is a general intent or by general, I mean

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No.
88-CR 80736 DT

ELBERT L. HATCHETT

Defendant.
_____/

SENTENCING

Proceedings had in the above-entitled cause, before the Honorable Lawrence P. Zatkoff, on June 1, 1989.

APPEARANCES:

On Behalf of Plaintiff
M. SUSAN MURNANE
817 U.S. Courthouse
231 West Lafayette
Detroit, MI 48226

On Behalf of Defendant
WILLIAM COLEMAN, III
PHYLLIS GOLDEN-MOREY
36th Floor
100 Renaissance Center
Detroit, MI 48226
and
ELBERT HATCHETT

Official Court Reporter
PAULA J. ALLARD
766 Westwood Drive
Birmingham, MI 48009
(313) 540-2687

* * *

[p. 19] THE COURT: Let the record reflect I've had an opportunity to review this file, I've had an opportunity to review my notes, I've had an opportunity to preside over this case and I've had an opportunity to

review the presentence report and several communications that were sent to the Court on behalf of the Defendant.

Let me say first, it is my opinion, my judgment, that the actions here for which the Defendant was convicted was not an accident, it was not an act of confusion, it was not an error in math, but a conscious, deliberate, knowing choice on behalf of the Defendant for whatever reasons he has, those reasons are his reasons.

There are numerous people that get audited by the Internal Revenue Service and I would assume that they would tell you as I would tell you after I, having been audited as a practicing attorney, it is a very unpleasant experience. The vast majority of Americans pay their taxes and go marching on to another tax rear [sic]. The Defendant in this case did not choose to do that.

Based on my understanding of this case, it is going to be the sentence of the Court with respect to Count 4 the Defendant be committed to the custody of the Attorney General for a period of one year and he pay a $25,000 committed fine. With respect to Count 5, it is going to be the judgment of this Court the Defendant be committed to the custody of the

* * *

United States of America
DEFENDANT

ELBERT L. HATCHETT
285 W. Hickory Grove Rd.
Bloomfield Twp., MI. 48013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
DOCKET NO 88-CR-80736-DT-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date MONTH DAY YEAR
6 1 89

___WITHOUT COUNSEL
However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

_X_ WITH COUNSEL
Phyllis Golden Morey
(Name of Counsel)

PLEA

___GUILTY, and the court being satisfied that there is a factual basis for the plea

___ NOLO CONTENDERE.

___ NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~/verdict of

___ NOT GUILTY. Defendant is discharged

_X_ GUILTY.

Defendant has been convicted as charged of the offense(s) of Failure to Pay Income Tax, (Counts' 4,5,6, & 8), 26:USC:7203

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced Because no sufficient cause to the contrary, was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count 4: one (1) year and a $25,000 committed fine;

Count 5: one (1) year and a $25,000 committed fine;

Count 6: one (1) year and a $25,000 committed fine; and

Count 8: sentence suspended and the defendant placed on probation for a period of five (5) years, to be begin [sic] upon release from custody. A $25,000 fine is also imposed.

SPECIAL CONDITIONS OF PROBATION

Counts 5 and 6 shall run consecutive to Count 4 and to each other.

It is further ordered that the defendant pay all back taxes during the period of probation.

The defendant shall voluntarily surrender to the designated institution on June 16, 1989 at or before 12:00 noon.

Bond cancelled upon surrender.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The court may change the conditions of probation, reduce or extend the period of probation at any time during the probation period or within a maximum probation period of the five years permitted by law may issue a warrant a revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The Court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshall or other qualified official.

I hereby certify that the foregoing is a true copy of the original on file in this Office.

CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SIGNED BY

X U.S. District Judge ___ U.S. Magistrate

/s/ L. P. Zatkoff
LAWRENCE P. ZATKOFF

By Bernadette Thebolt
Deputy Clerk

Date 6/1/89

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ELBERT L. HATCHETT, Defendant-Appellant. _____/	Court of Appeals No. 89-1679 District Court No. 88-CR- 80736-DT

APPELLANT'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

(Filed Nov. 21, 1990)

I. SUMMARY OF ARGUMENT

The majority opinion effectively abolishes the defense of good faith reliance upon advice of counsel in this jurisdiction because it makes it impossible for the defendant to put into evidence disclosures made by him to his attorney. The majority reached this unfortunate result because of reasoning that was based on an erroneous assumption.

The majority ruled that testimony of an attorney about disclosures made to him by his client are hearsay because they were offered to prove the *truth* of the disclosure. This holding squarely contradicts *Eisenstein v. United States*, 731 F.2d 1540, 1545 (11th Cir. 1984), which held that such testimony is not hearsay because it is offered not for the truth of the matter, but to show that

"full disclosure" was made. The majority assumed, however, that a defendant could establish the advice of counsel defense by having testimony concerning disclosures by the client come into evidence in the form of testimony elicited directly from the client about the disclosures made to the attorney. *See United States v. Hatchett*, No. 89-1679, slip op. at 12 n.8 (6th Cir. Nov. 7th, 1990). This assumption is wrong.

If Mr. Hatchett took the stand to testify about the disclosures he made to his attorney, this testimony could not withstand a hearsay objection. If Mr. Hatchett, rather than his attorney, testified to the disclosures, it would have been no less an out of court statement. If Mr. Hatchett, rather than this attorney, testified about the disclosures, under the majority's analysis, it would have also been offered for its truth. Consequently, testimony by Mr. Hatchett about disclosures made by him to his attorney could not withstand a hearsay objection.

What is the impact of this ruling on the advice of counsel defense? Clearly, the attorney, Mr. Gettleson and his client, Mr. Hatchett, are the only witnesses available who have any knowledge about the disclosures made. Since neither the attorney nor the client's testimony about the disclosures can withstand a hearsay objection, how can a defendant show compliance with the full disclosure requirement of the advice of counsel defense; he can't. The court's ruling effectively abolishes the advice of counsel defense. Thus, by ruling that evidence of disclosures made by a client to his attorney is hearsay when the attorney testified about such disclosures, the majority opinion has precluded future defendants from proving that they made a full disclosure of all pertinent facts

when they sought their attorneys' advice. Moreover, the panel decision is in direct contradiction to the holdings in *United States v. Eisenstein*, 731 F.2d 1540 (11th Cir. 1984), *cert. denied; United States v. McLennan*, 563 F.2d 943 (9th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978), and *United States v. Freeman*, 519 F.2d 67 (9th Cir. 1975).

The advice of counsel defense has long been recognized as one of the basic devices for defeating the willfulness – which is tantamount to *mens rea* – element of a crime. By abolishing the advice of counsel defense *sub silentio*, the majority opinion deprives the defendant of his ability to negate *mens rea*, thereby compelling a conviction whenever a defendant has been accused of a crime for failing to do an act required by law, such as filing timely tax returns or CRT's. The denial of such a fundamental right deprives the defendant of due process under the Fourteenth Amendment. Accordingly, rehearing or rehearing en banc is required because this case implicates such fundamental constitutional rights.

II. INTRODUCTION

On November 7, 1990, a panel of this court affirmed appellant's conviction with Judge Jones filing a dissenting opinion. (*Hatchett*, Slip Opinion – Attachment A). Appellant, Elbert L. Hatchett, files this petition for rehearing of the majority panel decision affirming his conviction on four misdemeanor counts of willful failure to pay federal income taxes for the tax years 1982, 1983, 1984 and 1986 in violation of 26 U.S.C. § 7203. Appellant was acquitted on the remaining four counts in the indictment which alleged: i) tax evasion, 26 U.S.C. § 7201; ii)

obstruction of tax collection, 26 U.S.C. § 7212(a); iii) concealment of property subject to levy, 26 U.S.C. § 7206(4); and iv) willful failure to pay income taxes for the 1985 tax year, 26 U.S.C. § 7203.

After the jury acquitted appellant of the three felony counts and one misdemeanor offense, appellant was sentenced on the four misdemeanor counts of failure to pay income taxes. The sentence imposed by the Court was the maximum possible penalty allowed under the statutes. Appellant was sentenced to twelve (12) months on each of three of the counts followed by a five year period of probation during which appellant was ordered to pay "all back taxes" as a condition of probation. Under this sentence, appellant will be required to serve 10 months on each 12 month sentence imposed, since he is not entitled to parole on a sentence of less than 12 months and one day. Thus, appellant must serve a thirty (30) month sentence followed by a five year period of probation for the misdemeanor convictions.

III. STATEMENT OF FACTS

Appellant, Elbert L. Hatchett was charged, *inter alia*, with the misdemeanor offenses of willful failure to pay income taxes for the years 1982 through 1986. Appellant raised the defense of good faith reliance upon the advice of counsel to negate the willfulness element of the misdemeanor charges. Appellant was also charged with three felony counts – evasion of the tax, obstruction of collection of the tax and concealment of property subject to levy. To prove these counts, the government introduced

evidence that Hatchett earned large sums of money during the years in question. The government sought unsuccessfully to prove that Hatchett used these funds to purchase items including car wash equipment and foster care homes, in the names of other people.

The government introduced testimonial and documentary evidence at trial which included all income tax returns filed by Hatchett prior to and during the time covered by the Indictment, audit summaries, reports relating to audits of Hatchett's taxes for ten consecutive years beginning in 1972, memoranda disallowing deductions and assessing substantial increased taxes as a result of each audit, letters to and from Hatchett, copies of all of Hatchett's banking records (including all cashier's checks issued by him or to him), monthly bank statements, financial statements filed by him, annual statements of his tax liability, interest and penalties, a list of all property claimed by Hatchett on his tax returns, and many other documents. Thus, the testimony of the government agents regarding the history of appellant's contacts with the Internal Revenue Service ("IRS") was voluminously documented and testified about in minute detail. These provided the jury with a complete picture of Mr. Hatchett's dealings with the government in regard to his taxes.

After the government's case was concluded, Hatchett commenced his defense against the charges. The only defense asserted against the failure to pay counts was appellant's good faith reliance upon advice of counsel. Appellant called his lawyer, Attorney Frank Gettleson, to testify about: i) the facts disclosed by Hatchett to Gettleson, ii) the research conducted by the lawyer, and iii) the advice Gettleson gave Hatchett. Attorney Gettleson

advised Mr. Hatchett that he should withhold further payments to the IRS until an agreement to liquidate the total tax obligation could be worked out or until the IRS reduced its claims to civil judgments.[1] By the time Gettleson was called as a witness by the defense, the trial record consisted of more than two weeks of testimony by government agents concerning the facts related to the advice which Mr. Hatchett sought from his counsel.

When defense counsel asked Attorney Gettleson what disclosures Hatchett made to Gettleson when he sought Gettleson's legal advice, the government objected on the grounds of hearsay and relevance. The following transpired in connection with the objection:

> Question: And in consulting with you, did he advise you as to any of the specifics regarding his tax liability, for example, the amount owed and how the amount had occurred?
>
> Answer: Yes, he did.
>
> Question: Could you tell the members of the jury *what he told you* in those conversations in early –.
>
> Answer: Objection, Your Honor, hearsay and relevance.

Attachment B – Gettleson's Testimony, Pg. 122 (emphasis supplied.)

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[1] Hatchett consulted Franklin Gettleson, a C.P.A. and practicing attorney of Birmingham, Michigan who has practiced in this area for over 20 years.

Defense counsel appealed to the Court to admit the testimony *for the express purpose of satisfying the full disclosure requirement* of the advice of counsel defense. Defense counsel responded to the objection [sic] follows:

> MRS. MOREY: Your Honor, it is hearsay, however, *with respect to the advice of counsel defense, the jury is entitled to determine whether pertinent facts were properly disclosed to the attorney and whether he relied upon those disclosures in giving the advice,* therefore, it is a necessary part of his testimony in order for the jury to evaluate it.
>
> * * *
>
> MRS. MOREY: I submit *we are not offering it for the truth of the matter asserted but under the Davenport decision with which the jury must make determinations as to whether the person seeking the legal advice made appropriate disclosures.*

(Attachment C – Gettleson's Testimony, pg. 123-24.)

The Trial Court sustained the objection on the grounds of hearsay even though the testimony was offered to prove only what facts Gettleson had been told, and *not* offered to prove the truth of those facts.[2]

---

[2] After the trial, the court rendered an opinion denying Appellant's motion for bond pending appeal and attempted to change its ruling on Gettleson's testimony as follows:

> "[a]though attorney Gettleson's testimony may have been admissible for the limited purpose of showing defense made a disclosure, it was not admissible to prove the facts constituting the disclosure. The advise (sic) of counsel defense requires not only evidence of disclosure, but also evidence that the facts disclosed were relevant –

(Continued on following page)

IV. ARGUMENT

A. The Ruling Of The Majority Abolishes the Advice Of Counsel Defense And Is In Conflict With All Reported Decisions On The Advice Of Counsel

The advice of counsel defense invoked by Hatchett required him to establish the following elements at trial: 1) that he sought the advice of a competent lawyer, 2) before receiving the advice he made a full disclosure of all material facts to the lawyer, and 3) that he then relied upon the advice and acted strictly in accordance with the advice given. *United States v. Eisenstein*, 731 F.2d 1540 (11th Cir. 1984). *United States v. McLennan*, 563 F.2d 943

(Continued from previous page)

> "The relevance of the facts disclosed could only have been determined had the jury considered as truthful the out-of-court statements which attorney Gettleson was asked to recite."

The trial court's effort to rectify its earlier ruling, which was *solely* on hearsay grounds, in the subsequent opinion by stating retrospectively that the exclusion of Gettleson's testimony was based on grounds of hearsay *and* relevancy clearly contradicts the record.

The majority opinion accepted the explanation of the ruling set forth in its opinion denying motion for bond pending appeal. *Hatchett*, slip op. at 12-13. However, this rationale is perplexing. If the testimony was admissible for the limited purpose of proving a disclosure, then, by the court's admission, it was not hearsay. Assuming, *arguendo*, that it was not hearsay and was relevant for a limited purpose, then it was the government's obligation, not the defendant's, to request a limiting instruction. *Hatchett*, slip op. at 28. The court's exclusion of relevant admissible testimony because it is introduced for a limited purpose is a draconian solution which deprived Mr. Hatchett of his defense.

(9th Cir. 1977). ("When the defense is advice of counsel, the advice given, whether correct or not, and whether the recitals in it are true or not, is always admissible." Id. at 946).

Any testimony by Mr. Hatchett concerning the statements he made to Mr. Gettleson are out of court statements. Under the majority analysis, any such statements would have been offered for their truth. Hence testimony from Hatchett about the disclosures he made to his attorney to satisfy the full disclosure requirement would be objectionable as hearsay under the majority's reasoning. *Hatchett*, slip op. at 28. There is simply no other witness who could provide testimony about the disclosures in order to satisfy the advice of counsel requirement.

As Judge Jones noted in his dissent:

> The majority seems to place great weight on the fact that Hatchett did not testify to the matters disclosed and therefore assert their truth. The majority suggests that if Hatchett had testified, or put on other evidence that went to the truth of the disclosure he made to Gettleson, then Gettleson's statements that disclosure was made would only go to the fact of disclosure. But this argument is circular. Presumably, "if the defense put on Hatchett to testify as to his conversations with Gettleson, this testimony would have been objected to as hearsay on the same grounds as Gettleson's." The defense would then have been required to corroborate Hatchett's testimony with other evidence as to the truth of his disclosure statements. The logical witness to corroborate Hatchett would be Gettleson but then, that is where we started.

Hatchett, slip op. at 28. Consequently, the ruling effectively abolishes the advice of counsel defense.

1. The Reliance Upon Advice of Counsel is Controlled by the Hearsay Rule

The question of whether Gettleson or Hatchett could testify as to what Hatchett told Gettleson is controlled by the hearsay rule. Federal Rule of Evidence 801 defines hearsay as:

> "A statement, other than one made by the declarant *while testifying at the trial* or hearing, offered in evidence to prove the truth of the matter asserted."

No distinction is made in the rule for whether the declarant is the defendant or some other witness. When Attorney Gettleson was asked about the disclosure Hatchett made to him, the objection was sustained on the basis of hearsay. In so doing, the Court implicitly concluded that the statement was being offered to prove the truth of the facts stated by Hatchett, and not simply to prove that *Hatchett told Gettleson these facts* irrespective of whether or not they were true. *Eisenstein, supra* at 1595. The trial Court obviously recognized its error when it later attempted to change its ruling from hearsay to relevancy grounds and by stating that it would have admitted the *statements for the limited purpose of showing disclosure*. Clearly, the record establishes that the testimony was *only* offered for this very "limited purpose".

2. The Jury Was Not Required To Accept Statements From Hatchett Or Gettleson As True

Both the trial Court and the Majority Opinion concluded that the attempt to have Gettleson testify as to

disclosures which Hatchett made to him was objectionable because it required the jury to accept the information contained in the assertions as true. The majority opinion attempts to distinguish *Eisenstein* on the basis that the assertions testified to by the lawyer in that case were not admitted for the truth of the assertions stated by him *because there was already testimony in the record as to the truth of the statements contained in the assertions.* (*Hatchett*, slip op. at Pg. 12, n.8). However, the majority opinion cavalierly ignores the plethora of evidence in the record concerning Mr. Hatchett's relationship with the IRS from which the jury could independently determine whether or not the disclosures were true. As Judge Jones noted in his dissent:

> It would be perfectly legitimate for Gettleson to testify to the fact that certain statements were made to him. The jury would then decide whether *Gettleson* told the truth as to the fact that the statements were made. Whether or not the statements themselves were true or not raises a wholly separate inquiry. Presumably, if Gettleson testified to Hatchett's disclosure, Hatchett would still need to produce evidence that he disclosed accurate and truthful information to Gettleson. *But he need not do so with the same witness.* Whether or not Hatchett ultimately put on enough evidence for the jury to infer that he had made out his advice of counsel defense has no bearing on the propriety of the trial judge's ruling on the admission of Gettleson's testimony.
>
> * * *
>
> The fact of the matter is that the trial judge precluded Hatchett from putting on evidence which was essential to his only defense: advice of counsel. It was for the jury to decide whether

> the facts disclosed were accurate based upon a comparison of the record to the alleged disclosures to Gettleson. In order to put on Gettleson's testimony as to disclosure statements made to him by Hatchett, the defendant was not required to offer support for the truth of the disclosures independent of the facts in the record concerning the amount of his tax liability, the filing of returns, the audit, etc. -

Hatchett, slip op. at 27-29 (emphasis in original).

In short, the issue of whether disclosure occurred is separate and distinct from the question as to whether the disclosures were full, accurate, and complete. While the question of whether disclosure was made could only come from the attorney or the client, the issue of whether the disclosures were full and complete can not be determined from any one witness or group of witnesses, but must be based on the entire record.

3. The Court Compounded Its Error By Allowing The Government to Elicit Testimony Of What Gettleson Was Not Told

The Court's error in sustaining the objection to Gettleson's testimony was compounded by its decision to allow the government to adduce testimony from Gettleson, over defense objection, about what Gettleson *was not told* by Hatchett; i.e. that in 1978 an installment agreement was terminated because Hatchett issued an insufficient fund check to the IRS. The effect of this contradictory ruling tied Hatchett's feet after the initial ruling had already tied his hands. The witness, who was precluded from telling the jury about Hatchett's disclosures, was permitted to tell the jury about Hatchett's

omissions, even though these omissions were immaterial to the attorney's advice.

The Majority opinion reasoned that:

> [Gettleson's] testimony was sufficient for the jury to determine whether Hatchett had made a full disclosure to Gettleson of all *pertinent facts*.

Hatchett, slip op. at 14 (emphasis added).

This reasoning totally ignores the fact that because of the trial Court's ruling, there was no testimony from Gettleson of "disclosures" which Appellant made and from which the jury could conclude that Appellant satisfied the requirement of full disclosure. The few matters that "sneaked" into the record do not constitute a fair recitation of disclosures which were required to prove this defense. Indeed, since the Court sustained the objections as to disclosures, the jury may believe that no disclosures were made.

The overwhelming unfairness of the Court's exclusion of Gettleson's direct testimony while permitting cross-examination testimony is even more apparent when viewed in the context of the overwhelming undisputed testimony adduced through the government's witnesses. When the plethora of historical data adduced by government witnesses is compared to the paltry "back door" information that Gettleson testified about, the jury had no choice but to convict Hatchett when the trial court's rulings rendered defendant's assertion of this defense completely meaningless.

In deciding whether Hatchett made a full disclosure to his attorney, the jury had to make a two-step assessment. First they were obligated to consider the

undisputed testimony of the government's witnesses for the *truth* of the assertions therein. Second, the jury should consider the disclosures Appellant made to Attorney Gettleson to determine *whether Appellant actually disclosed all pertinent facts.*

The trial court's exclusion of Gettleson's "disclosure" testimony deprived the jury from analyzing the completeness of the disclosures, and thereby made it *impossible* for Appellant to ever sustain an advice of counsel defense.

4. The Majority Opinion Is In Conflict With Other Circuits On The Advice Of Counsel Defense

The majority opinion places the Sixth Circuit in conflict with *all* cases in other circuits that recognize the advice of counsel defense. The leading case on the issue as stated in the majority opinion is *U.S. v. Eisenstein, supra.*

In *Eisenstein,* the defendants were charged with violating the Currency and Foreign Transaction Reporting Act and both defendants asserted the defense of reliance upon advice of counsel.

Ghitis testified at trial but only after his deposition testimony had been introduced during the government's case to show that he had told others about his knowledge of the reporting laws. Eisenstein never testified at trial.[3]

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[3] The defendants have obtained the transcript from the Eisenstein trial, and if rehearing is granted will be able to

(Continued on following page)

When questions were asked of the lawyer about what Ghitis (not Eisenstein) had told him, the trial Court sustained the government's objection to those questions on *hearsay* grounds. However, the Eleventh Circuit reversed convictions of both Ghitis and Eisenstein. The *Eisenstein* court reasoned that the lawyer's statements of what his client told him were not hearsay and were legally admissible. The Court stated:

> "The lawyer's testimony was not offered as proof of the matter asserted – i.e., that Ghitis and Eisenstein operated a currency exchange but as evidence *that Ghitis fully disclosed the nature of his business to his attorney. The testimony was admissible to show the attorney's knowledge and to show Ghitis' compliance with the 'full disclosure requirement of his advice of counsel defense'* ".

731 F.2d at 1545 (emphasis added).

The offer of proof by defense counsel in the instant case regarding Gettleson's testimony was identical to the grounds upon which the Eleventh Circuit admitted the testimony of that lawyer.

The Majority opinion's attempt to distinguish *Eisenstein* also fails because it ignores the fact that Eisenstein's conviction was reversed even though *there were no facts in the record establishing what he told the attorney and Eisenstein did not testify at trial.* There was no testimony that Ghitis and Eisenstein met with the attorney at the same

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(Continued from previous page)

present the precise factual pattern in *Eisenstein* with which greater detail than is described in the written opinion.

time. Nor was there evidence that the knowledge imparted to the attorney was equally applicable to both defendants. It would strain credulity to conclude that all of the pertinent facts known by Ghitis which he was required to be disclosed to his lawyer would be identical to those facts known by Eisenstein when the two of them operated in different countries and performed different functions in the operation.

Moreover, the *Eisenstein* Court reversed the conviction, even though there was no evidence of full disclosure by him because the jury was permitted to evaluate Eisenstein's disclosures, if any, *as told by the lawyer,* against the known facts of the case. The opinion of the majority denies Appellant and all other defendants in the Sixth Circuit that right.

B. The Panel Decision Affirming Appellant's Sentence To Pay All Back Taxes As A Condition Of Probation Exceeds The Trial Court's Jurisdiction

The majority opinion determines that the District Court's order was not an order of restitution entered pursuant to 18 U.S.C. § 3651; however, the majority fails to state upon what authority the trial court's sentence was ordered. Clearly, the majority opinion adopted the argument of the government, that the district court order was not one of restitution, rather than deciding the jurisdictional basis for the Court's entry of an order requiring appellant to pay all back taxes as a condition of his probation. The majority decision is incorrect insofar as it assumes, without deciding, that the district court's order was not an order of restitution and it is further incorrect

insofar as the Court found that there was not abuse of discretion in ordering the payment of all back taxes as a special condition of appellant's probation.

Appellant was sentenced to a twelve month term of imprisonment each on Counts IV, V and VI of the indictment. As to Count VIII of the indictment, sentence was suspended and appellant was placed on probation for a period of five years. As a condition of probation, the Court ordered appellant to make restitution by paying "all back taxes" and imposed a $25,000.00 committed fine as to each Count (*See* R-1 Judgment and Probation Commitment Order). The majority decision is contrary to the prevailing case law concerning conditions of probation which can be ordered by a court and it is further contrary to the statutes which authorize federal trial courts to order the payment of fines as a condition of probation. The Federal Probation Act, 18 U.S.C. § 3651, authorizes a trial court to order a defendant to make restitution as a condition of probation. This statute permits a trial court to suspend the imposition or execution of sentence, place the defendant on probation and require the defendant to make restitution "for actual damages or loss caused by the offense for which conviction was had" as a condition of probation. *Fiore v. United States*, 696 F.2d 205, 207 (2nd Cir. 1982). In *Fiore v. United States, supra*, the Court held that 18 U.S.C. § 3651 is *"the only source of the Court's power to suspend the imposition or execution of sentence"*. Insofar as the trial court's order in this case, suspended the imposition of sentence and required appellant to pay monies as

a special condition of his probation, the authority for the court's action can only emanate from 18 U.S.C. § 3651.[4]

The majority opinion states that an "order [to pay back taxes] need not be limited to amounts owed for the years for which Hatchett was convicted". However, this statement is clearly contrary to *United States v. Green*, 735 F.2d 1203, 1205 (9th Cir. 1984), *cert. denied*, 110 S. Ct. 568 (1989); *United States v. Johnson*, 700 F.2d 699, 701 (11th Cir. 1983); *United States v. McDonough*, 703 F.2d 19, 24 (7th Cir. 1983); *United States v. Taylor*, 305 F.2d 183, 187 (4th Cir.), *cert. denied*, 371 U.S. 894 (1962). Each of these decisions, *Green, Johnson, McDonough* and *Taylor*, have consistently held that in "criminal tax cases, [a trial] court may order restitution *only* of back taxes for the years involved in the conviction." *United States v. Green*, 735 F.2d at 1205 (emphasis supplied). Thus, the majority opinion is in clear conflict with four other circuit courts which have construed trial courts as having limited jurisdiction to order repayment of taxes that are the subject of counts for which the defendant has been acquitted. In this respect, the majority opinion is not only flawed but it contravenes the prevailing case law that exists in the circuits as it

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[4] 18 U.S.C. § 3663 authorizes a trial court to order defendant to make restitution to a victim of an offense, however, such an order is not made as a condition of probation. Thus, only the Federal Probation Act, 18 U.S.C. § 3651, authorizes the trial court to suspend imposition of sentence and order payment of funds as a condition of probation.

relates to this issue. Accordingly, a rehearing of the panel and/or a rehearing *en banc* should be afforded appellant in order to make clear the Sixth Circuit construction of 18 U.S.C. § 3651 and the authority conferred upon trial courts.

V. CONCLUSION

When the trial Court sustained the government's objection to Gettleson's testimony of Appellant's disclosures to satisfy the full disclosure requirement, Hatchett's ability to prove the defense of advice of counsel was extinguished. This ruling, affirmed by the majority, places the Sixth Circuit alone in abrogating the defense of advice of counsel.

Every person deserves a fair trial and fair appellate review within the bounds of the law without regard to whether that person is popular, unpopular, controversial or out-spoken. A jury should decide appellant's fate after all relevant and admissible evidence has been weighed; not after significant evidence is withheld and his burden has been made impossible. The unprecedented severity of Hatchett's sentence coupled with the trial Court's denial of Hatchett's request for bond pending appeal from misdemeanor convictions renders the community eye more jaundiced at the fairness he has been accorded.

The issues presented in this appeal are important not only to the appellant but also to the jurisprudence of this Circuit and the people served by it. In light of the irreconcilable conflict between the Sixth Circuit and other circuits, it is imperative that this Court address the issues presented herein *en banc*.

Respectfully submitted,

/s/ William T. Coleman III
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(P26922)
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Dated: November 21, 1990

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

HONORABLE MANUEL L. REAL,
JUDGE PRESIDING

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. CR 82-537-JCP
BENO GHITIS, VICTOR EISENSTEIN, Defendants.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PLACE: Miami, Florida

DATE: Monday, November 22, 1982

FLORENCE CARCIA, CSR
Official Court Reporter
442-D U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No.
88-CR 80736 DT

ELBERT L. HATCHETT and
LAURESTINE HATCHETT,

VOLUME 19

Defendants.
_____/

JURY TRIAL

Proceedings had in the above-entitled cause, before the Honorable Lawrence P. Zatkoff, and a jury, on March 28, 1989.

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* * *

[p. 44] If you find the Defendant consulted with a competent attorney in order to ascertain the legality of the matters here involved, and if you also find that the Defendant in good faith supplied the attorney with a complete and accurate report of all of the material facts relating to the Defendant's inquiry, and if you also find that thereafter the Defendant acted strictly in accordance with the advice of his attorney, you may find the Defendant did not act willfully in the violations charged.

But on the other hand, if you find that the Defendant failed to supply the attorney with a complete and accurate report of all the material facts or that the Defendant failed to act strictly in accordance with the advice of his attorney, then it is no defense to the offenses charged that the Defendant consulted with and received an opinion from an attorney.

The mere failure to pay taxes, without any showing of the Defendant's intent, is not a crime.

It is Defendant's theory of the case that he cannot be found guilty for the failure to pay his taxes as pertains to Counts Four through Eight because his failure was not willful. Defendant's failure to pay was not willful because

he intended to pay the tax, but withheld payment pending the negotiation of a plan with the IRS providing for the timely liquidation of his tax debt.

* * *

FILED
MAY 21 1991
OFFICE OF THE CLERK

No. 90-1544

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

ELBERT L. HATCHETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly limited the testimony of a witness in connection with petitioner's proffered defense of advice of counsel, in a case where the witness neither recommended that petitioner take the actions for which he was prosecuted nor advised petitioner that those actions were legal.

2. Whether it was permissible under now-repealed 18 U.S.C. 3651 (1982) to require petitioner, as a condition of his probation, to fulfill his legal obligation to pay his outstanding taxes.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1544

ELBERT L. HATCHETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-36) is reported at 918 F.2d 631. The opinion of the district court (Pet. App. 37-47) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1990. A petition for rehearing was denied on February 8, 1991. Pet. App. 48. The petition for a writ of certiorari was filed on April 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on four counts of failure to pay federal income taxes (for 1982, 1983, 1984, and 1986), in violation of 26 U.S.C. 7203. The court sentenced petitioner to three consecutive one-year sentences, a five-year term of probation, and a $100,000 fine. As a condition of his probation, petitioner was ordered to pay all his outstanding taxes. The court of appeals affirmed. Pet. App. 1-36.

1. Petitioner is a well-compensated attorney who for years has failed to keep up with his federal income tax obligations. The Internal Revenue Service determined in the late 1970s that petitioner owed back taxes of $107,454.14 for the years 1973-1977. In the summer of 1978, petitioner entered into an agreement with the IRS pursuant to which he would pay $750 per week—$500 for his 1978 estimated tax payments and $250 for his delinquent taxes. Pet. App. 2. After some of petitioner's checks to the IRS were dishonored, the IRS terminated the agreement at the end of 1978. *Id.* at 16.

During subsequent years, petitioner filed tax returns indicating a substantial amount of income and acknowledging the existence of substantial tax liabilities, but making little or no payment. Pet. App. 2. For example, during the five years from 1982 through 1986, petitioner filed returns indicating a total gross income of $2,910,199 (more than $580,000 a year) and acknowledging a tax liability of $1,007,615. During that period, however, he made only a single payment of $100,000 toward his tax liability. Moreover, only one of petitioner's returns during that period was filed in a timely manner: three were filed

one year late, and a fourth was filed two years late. *Id.* at 5-6. Petitioner was indicted on October 28, 1988.

2. At trial, petitioner contended that he did not have the intent required for the offense of failure to pay taxes, because he had relied on the advice of a long-time friend who was also an attorney. The friend and attorney, Franklin Gettelson, testified that he had spoken with petitioner in late 1979 or early 1980 about how petitioner should deal with his tax problems. Pet. App. 61-62. Gettelson testified that he had told petitioner at that time that "the best thing [petitioner] could do was to file the tax returns which were then due and to wait and pay the tax [when] he was able to resolve all of the problems he was having." *Id.* at 65. Gettelson added that he had advised petitioner that that course of action, although a "sound position," *id.* at 70, would subject him to penalties under the tax code: "I explained to him it would be expensive in terms of interest and penalties. I further explained to him that the interest would be deductible when he paid it and there would be some relief in that regard but that it would cost substantially, substantially more to defer the payment." *Id.* at 66. On cross-examination, Gettelson clarified that he had not advised petitioner to withhold payment of taxes or estimated tax payments during the years for which petitioner was indicted. *Id.* at 43.[1]

At one point in Gettleson's testimony, petitioner's counsel asked what petitioner had told Gettelson in the course of their 1979 or 1980 discussions. The

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[1] The portion of Gettleson's testimony that is not included in the appendix to the petition is set forth as an appendix to this brief.

prosecutor objected on grounds of hearsay and relevance. Pet. App. 62. The prosecutor pointed out that the conversation in question occurred in 1979 or 1980, and the indictment charged tax violations beginning in 1983. She contended that a proper foundation had not been laid for the evidence in question because "it is too far removed from the time frame of the indictment for reliance on counsel at that time to be an appropriate predicate for the hearsay." *Id.* at 63.

Petitioner's counsel conceded at the outset that the testimony would be hearsay. She argued, however, that it was admissible because it was not being offered as evidence of the truth of the matters contained in petitioner's statements to Gettleson, but rather to show that petitioner had disclosed his tax situation to Gettleson. Counsel argued that the testimony should be admitted because adequate disclosure is an element of the advice-of-counsel defense on which petitioner was relying. Pet. App. 63-64.

The prosecutor responded that testimony about advice petitioner received in 1980 could not form the basis for a defense of advice of counsel with respect to a course of conduct beginning in 1983. She therefore renewed her objection to Gettleson's testimony on that ground. Pet. App. 64. The district court sustained the government's objection, subject to reconsideration if petitioner wished to submit further briefing on the point. *Id.* at 64-65.

3. After trial, petitioner renewed his challenge to the exclusion of the testimony, arguing that the decision of the district court conflicted with the Eleventh Circuit's decision in *United States* v. *Eisenstein*, 731 F.2d 1540 (1984). The district court rejected that argument for three reasons. Pet. App. 37-47.

First, the court observed that Gettleson's testimony, unlike the testimony in *Eisenstein*, was the only evidence offered to prove the disclosures. Pet. App. 40-42. The court noted that although Gettleson's testimony "may have been admissible for the limited purpose of showing [petitioner] made a disclosure, it was not admissible to prove the facts constituting the disclosure." *Id.* at 41. There was no evidence submitted at trial, the court explained, "to support the conclusion the disclosure to which attorney Gettleson was to testify was a disclosure of the relevant facts." *Ibid.* That element of the advice-of-counsel defense could be satisfied, the court concluded, only if the jury "had * * * considered as truthful the out-of-court statements which attorney Gettleson was asked to recite." *Id.* at 41-42. Because there was no evidence to provide the factual basis for the disclosure, the statements by Gettleson, unlike those in *Eisenstein*, "were necessarily offered not only to prove that disclosure was made, but also to prove the truth of the out-of-court statements" that petitioner sought to elicit from Gettleson. *Id.* at 42. Therefore, the court concluded, the testimony in question was inadmissible on hearsay grounds. The court added that its ruling on the admission of the statements might have been different if counsel had indicated that the factual basis underlying the disclosure would be provided through a different witness, or even if counsel had asked that the statements be admitted subject to a cautionary instruction limiting their use to showing that the disclosure was made. *Ibid.*

Second, the district court noted that it had excluded the evidence not only because it was hearsay, but also because it was irrelevant, and that petitioner had failed to show how the evidence was relevant. Pet.

App. 40, 47 n.3. The court explained that it had found the evidence irrelevant "because it called for testimony regarding the time period of 1979-1980, a period not relevant to the charges of willful non-payment of taxes commencing in 1982." *Id.* at 47 n.3.

Finally, the district court concluded that even if the exclusion of Gettleson's testimony about petitioner's disclosures was error, the error was harmless, because "there was absolutely no evidence to suggest Mr. Gettleson advised [petitioner] not to pay his taxes in the years in question." Pet. App. 42-43. Because Gettleson never specifically advised petitioner to follow the course of conduct he ultimately pursued, the court held that the advice-of-counsel defense would not have been available even if the testimony had been admitted. *Id.* at 43-44.

4. Petitioner raised numerous contentions on appeal, but only two are relevant to this petition: (1) his claim that the district court erred in excluding Gettleson's testimony; and (2) his claim that the district court did not have the authority to require him to pay back taxes as a condition of his probation. The court of appeals rejected both claims.

On the evidentiary point, the court of appeals rejected petitioner's argument for two reasons. First, it distinguished *Eisenstein* by noting that the facts to which the attorney wished to testify in *Eisenstein* were independently narrated to the jury by one of the defendants. Thus, in *Eisenstein* there was admissible evidence from which the jury could assess the credibility of the statements made to the lawyer. In this case, by contrast, no admissible evidence was offered to show that the disclosures made to Gettleson were true or that petitioner believed them to be true. Moreover, there was no suggestion from counsel that other

evidence would be forthcoming to provide a proper foundation for the admission of petitioner's out-of-court statements to Gettleson. Under these circumstances, the court of appeals held, the district court did not abuse its discretion by excluding the statements. Pet. App. 14-16.

The court further found that the exclusion of the evidence "could not have undermined the jury's ability to determine the strength of the advice of counsel defense." Pet. App. 16. After summarizing the testimony that petitioner was permitted to present, the court concluded that it "was sufficient for a jury to determine whether [petitioner] had made a full disclosure to Gettleson of all pertinent facts." *Id.* at 17. The court noted that the government had not argued to the jury that petitioner's advice-of-counsel defense should fail for lack of full disclosure, but rather that it should fail because the advice had not been sufficiently specific to justify the inference that petitioner had relied on that advice when he engaged in the conduct for which he was prosecuted. Accordingly, the court concluded, there was little or no risk that the exclusion of the evidence affected the verdict. *Ibid.*[2]

The court of appeals also rejected petitioner's argument that it was improper to order petitioner to pay back taxes as a condition of his probation. Pet. App. 28-30. The court acknowledged that 18 U.S.C. 3651 (1982) allowed a court to order restitution as a condition of probation only for the counts on which a

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[2] Judge Jones dissented on the evidentiary point, arguing that the decision conflicted with *Eisenstein* and that it was irrelevant that the matters to be related by Gettleson had not independently been established, because it was up to the jury to evaluate the truth of the disclosures. Pet. App. 30-33.

defendant had been convicted. It found that the district court's order requiring petitioner to pay all his back taxes was lawful, however, because it was not a restitutionary order; instead, the court held, the order was "no more than" a requirement that petitioner "comply with the law as a condition of probation." Pet. App. 29.[3]

ARGUMENT

1. Petitioner contends (Pet. 14-28) that the district court erred in excluding a portion of Gettleson's testimony that petitioner claims was essential to his advice-of-counsel defense. The exclusion of that evidence was not reversible error, for several reasons.

a. First, the district court was correct in excluding Gettleson's testimony about petitioner's disclosures on hearsay grounds. It is true, as the district court noted, that Gettleson's testimony regarding petitioner's disclosures to him might have been admissible if it were offered solely to show that the statements were made. As the district court pointed out, however, petitioner did not offer to have the jury instructed that the testimony could be used only for a nonhearsay purpose. Moreover, if the testimony had been limited to that purpose, the district court could properly have found it to be irrelevant.

Gettleson's testimony about petitioner's disclosures to him was relevant only to petitioner's advice-of-counsel defense. In order to raise that defense, peti-

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[3] Judge Jones also dissented on the probation issue, noting that other courts had held that it was impermissible to impose conditions on probation that required restitution for crimes other than those for which the defendant had been convicted. Pet. App. 33-36.

tioner had to show that his disclosures to Gettleson were accurate and complete, or at least that petitioner believed them to be so. See *Williamson* v. *United States*, 207 U.S. 425, 453 (1908) (approving an instruction that in order to be entitled to the advice-of-counsel defense, the client must "fully and honestly lay[] all the facts before his counsel"); E. Devitt & J. Blackmar, *Federal Jury Practice and Instructions* § 14.12 (3d ed. 1977) (standard instruction on advice-of-counsel defense requires the defendant to make "a full and accurate report to his attorney of all material facts of which he has the means of knowledge"). As to the accuracy of the disclosures and petitioner's belief in their accuracy, however, Gettleson's testimony was clearly hearsay. Because petitioner offered no other evidence from which the jury could assess the accuracy and completeness of petitioner's statements to Gettleson, the district court and the court of appeals correctly concluded that in effect Gettleson's testimony was being offered not only for the proper purpose of showing that the statements were made, but also for the improper purpose of proving the truth of those statements. See Pet. App. 15-16.

Petitioner overstates the breadth of the court of appeals' ruling on this point. The court did not suggest that testimony by an attorney regarding disclosures made to him by a defendant should always be excluded on hearsay grounds. To the contrary, the court quoted the district court's observation that if defense counsel had asked that the testimony be admitted with a limiting instruction, or had indicated that another witness would provide a foundation for the testimony about the disclosure, Gettleson's testimony might have been admitted. Pet. App. 15. The court of appeals held the evidence inadmissible only

because the court agreed with the district court that, under the circumstances of this case, "Gettleson's testimony was offered to prove the truth of [petitioner's] out-of-court disclosures, and in the absence of a proffer by [petitioner's] counsel of other evidence that could prove the truth of the disclosures, the court properly ruled that [petitioner's] declarations came within the definition of hearsay and were inadmissible." *Id.* at 15-16.[4]

The court of appeals' decision does not conflict with *United States* v. *Eisenstein*, 731 F.2d 1540 (11th

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[4] For that reason, petitioner is incorrect in his broad contention (Pet. 23) that the effect of the court of appeals' decision is "to void the advice of counsel defense *sub silentio*." The court of appeals did not hold that evidence regarding statements made to and advice obtained from a lawyer is admissible only if there is corroborating evidence in the record regarding the statements and advice. The court simply held that a particular out-of-court statement could be used only for non-hearsay purposes, and that it could be excluded if it was likely to be used for an impermissible purpose.

In this case, petitioner would be in a position to know whether his disclosures to Gettleson were accurate and complete, or at least whether he believed them to be so (and thus justifiably could rely on the advice he received). Therefore, petitioner could have testified, even without corroboration from Gettleson, about the disclosures he made to Gettleson (assuming the court had found that the disclosures overcame the prosecutor's relevance objection). Petitioner also might have been able to establish the accuracy of his disclosures to Gettleson through other admissible evidence—perhaps even through Gettleson's testimony, taken in conjunction with other evidence regarding the disclosures. Contrary to petitioner's suggestion, nothing in the decision of either court below would foreclose such a result. The district court and the court of appeals held only that, in the context in which Gettleson's evidence was offered, it was apparent that that evidence would be taken to vouch for the accuracy of petitioner's disclosures.

Cir. 1984), on which petitioner relies. In *Eisenstein*, the defendant who sought legal advice testified personally about his statements to the attorney. 731 F.2d at 1546. It was therefore likely that the attorney's testimony would be used only for the proper, non-hearsay purpose of showing that the statements were made, and unlikely that the attorney's testimony would be used by the jury for the improper purpose of establishing the truth of the statements or the defendant's belief in their truth. In *Eisenstein*, then, unlike in this case, there was no significant risk that the attorney's testimony would be called upon to serve two distinct functions, one of which was illegitimate.

Petitioner argues (Pet. 25 n.15) that *Eisenstein* is not distinguishable from the present case on the ground cited by the district court and the court of appeals, because in *Eisenstein* neither defendant had testified before the attorney was called to testify. That fact does not undermine the distinction between this case and *Eisenstein*, however, because neither court in this case premised its ruling on the order of proof. Instead, the courts in this case based their analysis on the absence of any independent proof regarding the accuracy of the disclosures anywhere in the record, as well as the absence of any proffer by petitioner that such evidence would be forthcoming at any point in the trial. See Pet. App. 15, 42.[5]

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[5] Petitioner relies (Pet. 24) on several other cases that allegedly conflict with the decision of the court of appeals in this case. *United States* v. *McLennan*, 563 F.2d 943 (9th Cir. 1977), cert. denied, 435 U.S. 969 (1978), the only other court of appeals case cited, is clearly inapposite. In that case, the court held admissible the government's evidence that the lawyer had told the defendant that his proposed course of action was unlawful. That evidence was obviously admissible

b. Second, the district court properly excluded Gettleson's testimony about petitioner's disclosures to him because it was irrelevant. See Pet. App. 40, 47 n.3, 63-64. Nothing in Gettleson's testimony indicated that his advice was applicable to future years. Instead, the testimony suggested that petitioner spoke with Gettleson not to secure general advice for future tax problems, but to ascertain how to deal with his current liabilities. For example, Gettleson testified that the consultation in 1979 or 1980 related to taxes owed "at that time," *id.* at 62, and that the advice he rendered dealt with "the tax returns which were then due," *id.* at 65. As the government's cross-examination made clear, Gettleson never advised petitioner to take the specific actions for which he was prosecuted. App., *infra*, 1a-9a.[6] Therefore, even if the hearsay objection did not justify exclusion of Gettle-

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to rebut the defendant's advice-of-counsel defense, because the fact that the lawyer had given negative advice was highly relevant to the claim of good faith reliance on advice of counsel, regardless of whether the advice was correct. The three state court cases on which petitioner relies likewise do not address the issue presented here. In two of them, *Salmen* v. *Kamberos*, 206 Ill. App. 3d 686, 565 N.E.2d 6 (1990), and *Tate* v. *Connel*, 3 Ariz. App. 534, 416 P.2d 215 (1979), the defendant testified, so those cases are subject to distinction on the same ground as *Eisenstein*. In the third case, *Morin* v. *Moreau*, 112 Me. 471, 92 A. 527 (1914), the testimony at issue was the defendant's testimony, so again there was no risk that the jury would use evidence from an attorney for hearsay purposes.

[6] See *Bisno* v. *United States*, 299 F.2d 711, 720 (9th Cir. 1961) (noting that "advice of counsel is no defense in a situation in which the accused is generally advised by counsel but counsel is not shown to have advised the specific course of action with which the accused is charged"), cert. denied, 370 U.S. 952 (1962); *United States* v. *McLennan*, 563 F.2d at 946.

son's testimony, the district court properly excluded the testimony for lack of relevance.

c. Third, it is clear from the record that the testimony introduced in this trial would have been inadequate to make out a defense of advice of counsel, even if the advice had been contemporaneous with petitioner's conduct. Reliance on the advice of counsel is material to specific intent crimes because it may vitiate the willfulness that is an element of such crimes.[7] The advice-of-counsel defense rests on the common-sense notion that a factfinder reasonably may doubt that the government has proved a "voluntary, intentional violation of a known legal duty," *Cheek* v. *United States*, 111 S. Ct. 604, 610 (1991) (quoting *United States* v. *Bishop*, 412 U.S. 346, 360 (1973)), if the defendant's attorney, after full disclosure of the relevant facts, advised the defendant that the challenged course of action would be legal. That advice can create the sort of misunderstanding of the law that defeats the government's effort to prove actual knowledge of the legal duty in question, see

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[7] See, *e.g.*, Pet. 23; *United States* v. *Duncan*, 850 F.2d 1104, 1117 (6th Cir. 1988) (explaining that a "defense of good faith reliance upon * * * counsel is a critical circumstance that may be dispositive of the central issue of willfulness"); *Eisenstein*, 731 F.2d at 1543 ("A defendant * * * can attempt to negate proof of specific intent by establishing the defense of good faith reliance on advice of counsel."); *United States* v. *McLennan*, 563 F.2d 943, 946 (9th Cir. 1977) (agreeing with defendant's claim that good faith reliance upon the advice of counsel can negate fraudulent intent); see also *Williamson* v. *United States*, 207 U.S. 425, 453 (1908) (approving a jury instruction stating that someone "could not be convicted of crime which involves willful and unlawful intent" if he "in good faith and honestly follows [the] advice [of his counsel], relying upon it and believing it to be correct, and only intends that his acts shall be lawful").

Cheek, 111 S. Ct. at 610-611. Accordingly, for this defense to apply, the advice must be that the proposed course of action is legal.

Petitioner was convicted of failure to pay taxes. To make out an advice-of-counsel defense, he therefore needed to establish that his attorney advised him that failure to pay taxes did not violate any applicable legal rules. Gettleson's testimony, however, shows that he explicitly advised petitioner that his conduct was unlawful. See Pet. App. 66 ("I explained to him [that] it would be expensive in terms of interest and penalties."). The advice in this case, then, was *not* advice that a proposed course of action was legal; rather, it was advice that a proposed course of action was tactically preferable.[8] Advice of that sort is not likely to lead a criminal defendant to believe his conduct is lawful.[9] It is therefore inadequate to establish

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[8] See, *e.g.*, Pet. App. 71 ("I felt if [the IRS] reduced [its] claim to judgment a district judge would have to look reasonably on a payment plan."); *id.* at 72 (agreeing with the suggestion that "a judge would be more reasonable in affording an installment payment plan than the IRS").

[9] Gettleson's testimony can be read to suggest that Gettleson told petitioner that his proposed conduct, although subject to civil penalties, would not result in criminal prosecution. See Pet. App. 70. But even if Gettleson's testimony is read in that manner, it does not buttress petitioner's proposed advice-of-counsel defense, because it does not undermine the requisite intent to violate a known legal duty. In fact, by referring to the penalties petitioner would incur by failing to make timely tax payments, Gettleson was making clear to petitioner that he had a legal duty to pay his taxes on a timely basis, and that his proposed course of action would violate that duty. In specific intent crimes, the only knowledge the government must prove is that the act in question violates the law; it need not also prove knowledge that the act is criminal. See, *e.g.*, *Liparota* v. *United States*, 471 U.S. 419, 425 n.9 (1985);

a valid advice-of-counsel defense. For that reason, the district court could properly have barred all of Gettleson's testimony going to the advice-of-counsel defense.

d. Finally, even if it was error for the district court to exclude the evidence at issue here, the error was harmless. As the court of appeals concluded, the exclusion of that portion of Gettleson's testimony "could not have undermined the jury's ability to determine the strength of the advice of counsel-defense." Pet. App. 16. Although Gettleson was not allowed to relate some of petitioner's statements to him, he repeatedly was allowed to testify about facts he knew as a result of his conversations with petitioner, thus allowing him to provide the jury a fair picture of the extent of petitioner's disclosures to him. For example, Gettleson testified that he knew the amount of taxes owed and how the deficiency had occurred, that petitioner had been audited, and that petitioner had made some payments. *Id.* at 16, 62. On the other hand, Gettleson acknowledged that he did not know that petitioner had been in an installment program, that the IRS had terminated because petitioner wrote bad checks or that petitioner was not then making current estimated tax payments. *Id.* at 16-17.

Moreover, the government did not argue to the jury that petitioner's defense should fail because of nondisclosure. Rather, the government's argument was that Gettleson's advice was not specific enough, with respect to the conduct charged in the indictment, to undermine the government's proof of willfulness. Pet. App. 17. For that reason, as the court of ap-

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United States v. *Freed*, 401 U.S. 601, 614-615 (1971) (Brennan, J., concurring).

peals explained, it was highly unlikely that the exclusion of petitioner's statements had any effect on the way the jury viewed the case. *Ibid.*

2. Petitioner devotes substantial attention (Pet. 14-23) to the argument that the district court's evidentiary ruling in this case denied petitioner his constitutional right to call witnesses and present a defense.[10] The short answer to that claim is that the Constitution does not trump ordinary applications of the rules of evidence and require that those rules give way whenever they impede a defendant's effort to present his case. See *Michigan* v. *Lucas*, No. 90-149 (May 20, 1991), slip op. 4; *Rock* v. *Arkansas*, 483 U.S. 44, 55-56 & n.11 (1987); *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983); *Washington* v. *Texas*, 388 U.S. 14, 23 n.21 (1967). Countervailing interests—most importantly, the integrity of the truth-finding process—justify applying rules of evidence to restrict the manner in which the defense presents its case, just as those rules restrict the manner in which the government may prove its case.

In this case, the district court applied familiar hearsay principles in a traditional fashion; the court simply sought to avoid the risk that the jury would make improper use of defense evidence that the government would not have a meaningful opportunity to

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[10] The court of appeals did not address petitioner's constitutional argument, which appears to have surfaced for the first time in petitioner's petition for rehearing before the court of appeals. Even there, petitioner devoted only one sentence to the argument and did not even cite an applicable constitutional provision. See Pet. App. 95 ("The denial of such a fundamental right [*i.e.*, the alleged abolition of the defense of advice of counsel] deprives the defendant of due process under the Fourteenth Amendment."). It therefore appears that petitioner has not properly preserved his constitutional claim for review.

challenge through cross-examination. Nothing in the district court's ruling prevented petitioner from seeking to show that he did not have the specific intent to violate the law. And, assuming petitioner could have shown that Gettleson's testimony was relevant, he presumably could have obtained its admission by offering admissible evidence as to the truth (or his belief in the truth) of the contents of the disclosures petitioner allegedly made to Gettleson. The district court's ruling that petitioner failed to satisfy that basic foundational requirement is not constitutionally suspect simply because the effect of that ruling was to bar the admission of evidence that was offered as part of petitioner's defense.

3. Petitioner also contends (Pet. 28-30) that the now-repealed version of the Federal Probation Act, 18 U.S.C. 3651 (1982), did not authorize the district court to impose as a condition of petitioner's probation a requirement that petitioner pay all his back taxes. Because Section 3651 has been repealed and does not apply to offenses committed after October 31, 1987, see Pub. L. No. 98-473, § 212(a)(1) and (2), 98 Stat. 2031, this issue is not of continuing importance and thus does not warrant review by this Court. In any event, the decision below is correct and its rationale does not conflict with the rationale of the decisions cited in the petition.

District courts imposing terms of probation under former Section 3651 enjoyed broad discretion in setting the conditions of probation. Section 3651 provided that the court "may * * * place the defendant on probation for such period and upon such terms and conditions as the court deems best." See *Burns* v. *United States*, 287 U.S. 216, 220-221 (1932) (noting that, "[t]o accomplish the purpose of the statute, an exceptional degree of flexibility in admin-

istration is essential"). The sentencing court's discretion was limited only by the requirement that the terms and conditions of probation bear a reasonable relationship to the rehabilitation of the accused, the protection of the public, deterrence of future misconduct by the probationer or others, warranted punishment, or some combination of those objectives. *United States* v. *Tonry*, 605 F.2d 144, 148 (5th Cir. 1979).

A judge would not violate the terms of Section 3651 by imposing as a condition of probation a requirement that a defendant comply with the law. Cf. *Burns*, 287 U.S. at 218 (noting without criticism a condition requiring compliance with laws). The condition in this case—that petitioner comply with his legal obligation to pay federal income taxes—does nothing more, and in fact is less onerous than a general requirement of compliance with the law. Moreover, in light of petitioner's convictions for failure to pay taxes, this condition seems particularly fitting. Our tax system depends on the voluntary assessment and payment of taxes. Failure to pay taxes that are acknowledged to be due and owing undermines that system; if the government were forced to resort to litigation against every citizen, the system would fail. See Pet. App. 78-82 (letters by petitioner indicating that he would pay taxes only after litigation). A requirement that petitioner comply with his legal duty to pay the taxes he already owes is thus entirely legitimate. See *United States* v. *Schiff*, 876 F.2d 272, 275 (2d Cir. 1989) (upholding condition of probation requiring payment of "all legally required" income taxes); *United States* v. *Merritt*, 639 F.2d 254, 256 (5th Cir. 1981) (upholding a requirement that defendants pay taxes falling due during the probationary period).

Petitioner does not discuss the language of the statute or the broad construction the courts have given it. Instead, he notes that one paragraph of Section 3651 specifically authorized restitution as a condition of probation, and that this paragraph did not authorize the imposition of restitution for crimes for which a defendant had not been convicted. Accordingly, he argues, the order in this case violated Section 3651. Pet. 28-29. The flaw in this argument is that it focuses on only one provision of Section 3651. It fails to address the broad introductory language of Section 3651, which provides ample support for the order entered in this case.

This flaw also demonstrates why the rationale of the decision below does not conflict with the reasoning of the four circuit court decisions on which petitioner relies. To be sure, two of those cases, *United States* v. *Green*, 735 F.2d 1203, 1205 (9th Cir. 1984), and *United States* v. *McDonough*, 603 F.2d 19, 24 (7th Cir. 1979), reversed trial court orders conditioning probation on the payment of taxes due for years other than the years of conviction. Those courts, however, assumed that the orders were entered only under the restitution provision and did not consider whether the orders could have been upheld under the general language that introduced Section 3651. Thus, while there is a difference in outcome among the decided cases, there is no conflict in the rationale of the decisions, which addressed different issues under Section 3651.

The other two cases cited by petitioner are farther afield. One of them, *United States* v. *Johnson*, 700 F.2d 699 (11th Cir. 1983), is a nontax case that, like the *Green* and *McDonough* cases discussed above, stated that a court could not order restitution under Section 3651 for crimes for which the defendant had

not been convicted. The final case, *United States* v. *Taylor*, 305 F.2d 183 (4th Cir.), cert. denied, 371 U.S. 894 (1962), although somewhat ambiguous in its reasoning concluded only that a district judge could not deprive a defendant of his right to contest the amount of taxes he owed, agreeing that the defendant could be required to pay "all taxes and penalties * * * determined to be due and collectible." 305 F.2d at 188.[11] Accordingly, the decisions cited by petitioner reached results contrary to the result in this case only because they relied on a portion of Section 3651 other than the one relied on below. Because the result below is correct and does not conflict with the reasoning of any other court, and because Section 3651 does not apply to any offenses committed after October 31, 1987, this issue does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1991

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[11] Relying on *Taylor*, the court of appeals imposed a similar limitation on the order in this case. See Pet. App. 30.

* * * *

[138] A. No.

Q. Now, in 1979, '80, when you discussed Defendant's tax problems, did you know that he had made no estimated tax payments for calendar year 1979?

A. I did not—let's see, 1979? I did not really examine the returns and I don't know what the posture was with respect to the content. I knew what the liability—I knew that there was a liability. I knew the returns had not been filed. I wasn't consulted with with regard to the estimated returns.

Q. Did you advise him not to make any further estimated tax payments?

A. No. That question never arose.

Q. How long did you consult with him on this occasion in 1979 and 1980?

A. Our consultation was kind of on a recurring basis because I would periodically, when I would see him or talk to him, I would ask him how things were going. So it was kind of a continuing thing in terms of our discussions.

Q. Subsequent to 1979, 1980, did you advise Defendant not to file tax returns with payment or to file tax returns without payment?

A. After that period of time? I don't know if that question ever came up again. I don't know if that question specifically ever came up again.

Q. Did you advise him that he should never make anymore [139] estimated tax payments?

A. I don't think that question ever came up again. The question that I resolved at the time had to do with attempting to resolve everything at one time and that's the advice that I gave him.

Q. Back in 1979 and 1980, is that correct?

A. Yeah, that would be the time frame.

Q. After that time, when did you have your next formal discussion of Defendant's collection problems? 1979, 1980 we have this one discussion. When was your next formal discussion?

A. Probably when he called on the collection department summons.

Q. 1984 that was. Did you advise him not to pay estimated taxes for 1981?

A. That issue never arose.

Q. Did you advise him not to file the 1981 tax return—or to not pay any taxes with the 1981 tax returns?

A. I don't believe we discussed after 1979-'80, that particular—

Q. So you did not advise him to withhold payment of the 1980, '81, '82, or '83 taxes?

A. No. When I spoke to him in 1979-'80 I said file the tax returns until you are able to resolve all your problems and then pay it on whatever basis you can work with them.

[140] Q. Now, in 1984, how did Defendant contact you about this summons?

A. I believe by telephone.

Q. And you intended to go to the meeting, did you not?

A. Yes.

Q. He—

A. Well, we discussed going to the meeting and I couldn't go at the time that I was supposed to go.

Q. Were you paid in connection with this—

A. No.

Q. Did you know Defendant hadn't paid any tax for—

If I may check for a moment, Your Honor.

Did you know that Defendant hadn't made any payment on his income taxes since September of 1980 at that time?

MR. LUSTIG: I'm sorry, would you repeat the question?

Q. (By Ms. Murnane) At the time of the 1984 collection summons, did you know that Defendant Elbert Hatchett had made no payments on his income taxes since September of 1980?

A. I knew he owed a substantial amount of tax. I don't know whether he paid or had not, I presume that he had not.

Q. At that time, in 1984, were you paid to consult with Defendant about the collection summons?

A. No. I wouldn't have charged Elbert nor would Elbert ever [141] charge me. That wasn't the kind of relationship that we had.

Q. I believe you said that you never discussed the meeting after it occurred, is that correct?

A. The meeting with the IRS?

Q. Yes. Other than in general terms to resolve it at one time?

A. Basically that was the extent of it. As I recall, that's what it was.

Q. Did you advise Defendant that he should continue to not pay his taxes at that time?

A. I don't think that question came up at that time.

Q. When was the next time you and Defendant formally discussed his collection problem?

A. Formally?

Q. Yes.

A. I don't know if we ever really, formally, in the sense he asked me to do something specifically.

In general terms, we would just periodically discuss it.

Q. In the course of your other conversation as old friends and occasional business associates, is that fair to say, it would just come up in the course of general conversation?

A. Well, yes. I knew he was very concerned and I was very concerned and I wanted to see what the status was, see how he was doing with resolving the problem. So I guess, whenever we happened to discuss it, we discussed it. I can't tell you with [142] any specific date. It was frequent.

Q. Do you get referrals from Defendant?

A. Periodically we do business together. We have a case we're working on jointly right now.

Q. Isn't it true these referrals are worth quite a bit of money in your practice?

A. It depends on what the case is. I mean depends on what the circumstances may be. Sometimes we have cases that do and sometimes we don't. Right now we have one case ongoing.

Q. In your discussion of the penalties for nonfiling, that occurred only back in 1979 and 1980, too, didn't it?

A. 1979 and 1982?

Q. Or 1980. That discussion also occurred back in 1979 and 1980?

A. We discussed that then, yes.

Q. And that discussion did not come up again, did it?

A. I knew the penalties were excessive because I knew the amounts of money were extraordinary.

Q. But you did not again discuss with Defendant after the meeting in 1979, 1980 what the penalties for refusing to pay would be, did you?

A. Well, he knew, because he received assessments.

Q. Did you discuss them with him?

A. I don't know if he specifically asked me or I specifically told him. He knew they were extraordinary because we discussed [143] them.

Q. Did you discuss with him, did you advise him on the penalties at any time other than at that 1979, 1980 meeting?

A. I don't recall any specific conversation that dealt only with penalties because it got to the point where the discussion was with dollars as opposed to the components of the liability. At the time that I first told him, I told him, look, your penalties and interests are going to be extraordinary and he was aware of that or made aware of that.

Q. To the best of your recollection, that's the only time that came up?

A. With any specificity, yeah.

Q. Did you ever contact the Internal Revenue Service on Defendant's behalf?

A. No.

Q. So your knowledge of what offers Defendant claimed to have been made came entirely from him, isn't that correct?

A. Yes. I saw correspondence, I saw different things but those would have come from him, yes.

Q. When you advised Defendant back in 1979 and 1980 to file without paying in order to resolve the whole thing at one time, did you expect Defendant to also make current estimated tax payments and to pay the tax with the subsequent returns? Did you expect that to be part of the total settlement?

A. We didn't really discuss that.

[144] Q. You didn't ever tell Defendant that he didn't have to pay current taxes, did you?

A. When you say current taxes, you mean file estimated tax returns?

Q. This year's taxes, yes.

A. We never discussed this year's taxes.

MS. MURNANE: Let me have a moment, Your Honor.

Q. (By Ms. Murnane) Isn't it true the only time you ever really discussed the payment, the payment of taxes, current taxes, was back in that initial 1979, 1980 meeting?

A. That was—it was more formally then, I suppose, because he specifically asked me to inquire as to—or to investigate and I suppose that was the formal time that I did that. And there may have been other times. I know there were other times because we discussed it frequently.

Q. Did you ever advise Defendant not to pay estimated tax payments?

A. I don't think the question of estimated tax payments was ever posed.

Q. Did you advise him not to pay his 1981 tax returns?

MS. MOREY: Objection, asked and answered.

THE COURT: This is cross-examination. You may continue.

Q. (By Ms. Morey) Did you advise him not to pay his 1981 tax return?

[145] A. If you construe what we talked about in '79 and '80, I suppose that would have applied in his mind to subsequent years.

Q. No. I want to know if you told him, if you told him in 1981 not to file and pay those taxes or to file and not pay those taxes.

MS. MOREY: Objection, asked and answered. The witness has testified—

THE COURT: This is cross-examination and it hasn't been answered.

WITNESS: I don't think that question specifically arose.

THE COURT: That's not an answer. I want to hear an answer, yes or no.

Q. (By Ms. Murnane) Did you tell Defendant that he should file his 1981 tax return and not make payment with it?

A. No.

Q. Did you tell him he should file his 1982 tax return and not make payment with it?

A. No.

Q. Did you tell him he should file his 1983 tax return and not make payment with it?

A. No.

Q. Did you tell him he should file his 1984 tax return and not make payment with it?

[146] A. No.

Q. Did you tell him he should file his 1985 tax return and not make payment with it?

A. No.

Q. Did you tell him he should file his 1986 tax return and not make payment with it?

A. No.

Q. Isn't it true that the Internal Revenue Service routinely requires one to make estimated tax payments and file and pay one's current taxes before they enter into an installment agreement?

MS. MOREY: Objection, lack of foundation.

THE COURT: Ms. Murnane.

MS. MURNANE: It is cross-examination. The witness has expressed opinions on the reasonableness of the Internal Revenue Service's policies. One is entitled to know what he knows about the Internal Revenue's policies.

THE COURT: That's not what you asked him.

MS. MURNANE: It is one question in that line.

THE COURT: Just lay the foundation.

Q. (By Ms. Murnane) Mr. Gettleson, have you negotiated installment payment programs?

A. Various times, yes.

Q. Isn't it true they universally require estimated tax payments and current—that one be current with one's other [147] tax obligations?

A. Universally? I don't know if it's done universally, no.

Q. Have you executed any installment payment programs in which one was allowed to not make estimated tax payments or to not pay one's current taxes and still make estimated tax on delinquent liabilities?

A. Are you talking about in the time I've been practicing as an attorney and a CPA prior to that?

Q. Hm-mm.

A. I don't recall. Because I just don't recall.

Q. Isn't it true there aren't any circumstances in which one can make installment loan payments without having to be current in one's tax obligations?

A. I don't know that for a fact, no.

Q. Did Defendant ever tell you that that's what the IRS was requiring of him for an installment payment program?

A. No.

MS. MOREY: Objection. It calls for hearsay, the exact same type of testimony we tried to get in on direct which the Government objected to.

THE COURT: Ms. Murnane?

MS. MURNANE: Your Honor, that particular question—

THE COURT: You're asking him what the Defendant told him?

[148] MS. MURNANE: Yes.

THE COURT: You want him to answer that question?

MS. MOREY: We will withdraw that objection.

MS. MURNANE: I'll withdraw the question.

Q. (By Ms. Murnane) Did you know what terms the Internal Revenue Service was requiring on the installment loan agreement?

A. At what point?

Q. At any point.

A. No. I think the correspondence that I saw was primarily the correspondence from Mr. Hatchett to the Internal Revenue Service in which he was offering to solve any liability.

Q. So the answer is you didn't know what the Internal Revenue Service was asking in connection with an installment payment plan, did you?

A. I never saw any specific document that would have told me that, no.

MS. MURNANE: No further questions, Your Honor.

THE COURT: Mr. Lustig?

MR. LUSTIG: I have no questions, Your Honor.

THE COURT: Ms. Morey, do you have any redirect of this witness?

MS. MOREY: No redirect, Your Honor.

* * * *

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No. 90-1544

In The

Supreme Court of the United States

October Term, 1990

ELBERT L. HATCHETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE AMICUS CURIÆ BRIEF IN SUPPORT OF PETITIONER

– AND –

AMICUS CURIÆ BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIÆ BRIEF IN SUPPORT OF PETITIONER, ELBERT L. HATCHETT

NOW COMES FEDERAL CRIMINAL DEFENSE ASSOCIATION OF MICHIGAN and THE NATIONAL BAR ASSOCIATION, by and through their duly authorized representatives and moves this Honorable Court for Leave to File an *Amicus Curiæ* Brief in Support of Petitioner, Elbert L. Hatchett, upon the following grounds and reasons:

1. One of the questions presented by this appeal is whether or not the ruling of the trial judge that precluded the Petitioner from establishing a necessary element of his advice of counsel defense, that he made a full disclosure to his attorney before receiving the advice relied upon by him, violated Petitioner's 5th and 6th Amendment rights and, of particular interest to the Petitioner's *Amicus Curiæ*, abrogated the long-standing defense to crimes involving

proof of wilfulness of one's good-faith reliance upon the advice of counsel.

2. Permission has been sought by both the above-named organizations from the United States Attorney's Office for the Eastern District of Michigan, to file an *Amicus Curiæ* Brief herein and we were advised by Assistant United States Attorney, Kathleen Moro Nesi on May 3, 1991, that it was her belief that the file had been turned over to the Solicitor General's Office and that the Solicitor General was the proper person from whom to seek concurrence. On that same date concurrence was sought from Assistant to the Solicitor General, Ronald Mann, on behalf of both organizations, and he advised that he did not have the authority to concur at this time..

3. That THE FEDERAL CRIMINAL DEFENSE ASSOCIATION OF MICHIGAN is an organization consisting of lawyers who are members of the Michigan Bar Association and who practice primarily in the Federal Courts of Michigan and who have specialized in the area of criminal law.

4. That THE NATIONAL BAR ASSOCIATION is an organization of lawyers, judges and law faculties/administrators throughout the country with a membership in excess of 12,000; many of whom confine their practices exclusively to criminal law.

5. That the resolution of the issue presented in the case of *Elbert L. Hatchett* vs. *United States of America* is extremely important to the jurisprudence of all of the states in the 6th Circuit and is further important to the jurisprudence of the United States in that it will have a fundamental impact upon the counseling role of criminal defense attorneys throughout the country.

6. That the decision of the courts below in the instant case makes it impossible for attorneys to render usable advice to clients on important prospective matters and

therefore the counseling role of the attorney affords a well-intentioned client no protection whatsoever from criminal charges of wilful violation of the law. The decision below has therefore completely abrogated the defense of good-faith reliance upon the advice of counsel as a defense to criminal charges involving allegations of wilful violation of the law.

WHEREFORE, Petitioner prays that this Honorable Court will grant permission to file the attached *Amicus Curiæ* Brief in Support of the Petitioner, Elbert L. Hatchett.

By: _____

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DATED: May 5, 1991

QUESTION PRESENTED

WHETHER AN EVIDENTIARY RULING WHICH TOTALLY DEPRIVES A DEFENDANT OF HIS RIGHT TO PRESENT EVIDENCE TO NEGATE WILFULNESS IN AN ADVICE OF RIGHTS DEFENSE TO A SPECIFIC INTENT CRIME VIOLATES THE RIGHTS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THIS IS THE ONLY DEFENSE TO THE CHARGE.

PARTIES

The Petitioner in this Court is Elbert L. Hatchett, who was the defendant in the proceedings below. Respondent is the United States of America. The Federal Criminal Defense Lawyers of Michigan and the National Bar Association appear as *Amicus Curiæ*, in support of Petitioner Elbert Hatchett.

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No. 90-1544

In The

Supreme Court of the United States

October Term, 1990

ELBERT L. HATCHETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

AMICUS CURIE BRIEF IN SUPPORT OF PETITIONER, ELBERT L. HATCHETT

THE FEDERAL CRIMINAL DEFENSE LAWYERS OF MICHIGAN and THE NATIONAL BAR ASSOCIATION respectfully pray that a Writ of Certiorari issue to review the opinion and Judgment of the Sixth Circuit Court of Appeals entered in this Proceeding on November 7, 1990.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported *sub nom United States of America v. Elbert L. Hatchett*, 918 F.2d 631, *reh'g den'd.* ___ F.2d ___, (6th Cir. 1991) and is reprinted in the Appendix to the Petition for Writ of Certiorari at 1.

The Opinion of the United States District Court for the Eastern District of Michigan, which is not reported, is set out in the Appendix to the Petition for Writ of Certiorari at 37.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on November 7, 1990. A timely motion for rehearing was denied on February 6, 1991. (App. 37) The Petition was filed within 60 days of the order denying rehearing.

The jurisdiction of this Court to review the Opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, and Rules 801 and 401 of the Federal Rules of Evidence.

STATEMENT OF THE CASE

The Statement of the Case included in the Petition for Writ of Certiorari filed by Petitioner is incorporated herein by reference as if fully set forth.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

Summary of Reasons for Granting Petition for Writ of Certiorari

Certiorari should be granted because the Trial Court decision has created a conflict between the Fifth and Sixth Amendments of the United States Constitution and the Federal Rules of Evidence concerning hearsay. Certiorari should also be granted to resolve the irreconcilable conflict between the decision of the Trial Court and the rule of law articulated in this Honorable Court in *Williamson* v.

United States, 207 U.S. 425 (1908) and followed in every federal and state decision pronounced thereafter.

Attorneys and counselors throughout the Sixth Circuit are deprived of their ability to perform the counseling portion of their job by the ruling of the Court. Both corporate and individual clients rely upon our profession for pre-litigation interpretation of the law to be sure that their actions do not violate the law. The rule of law must be rational and articulable to protect those clients who have staked their compliance with the law on the advice of competent attorneys. After the decision of the Trial Court, affirmed by the Sixth Circuit, the only thing an attorney can ethically advise a client is that if all of the rules relating to advice of counsel are followed it provides no protection whatsoever against criminal prosecution because the evidence of compliance cannot be introduced before the jury.[1]

Moreover, the decision of the Lower Court renders it impossible for trial attorneys to ever present a meaningful defense for a client accused of a specific intent crime who acted in strict accordance with the advice of a competent attorney after full disclosure of all material facts to the attorney because the evidence of full disclosure has been ruled inadmissible in the Sixth Circuit.

I.

THE RULE OF LAW IN THE ADVICE OF COUNSEL DEFENSE REQUIRES PROOF OF FULL DISCLOSURE OF ALL MATERIAL FACTS TO A COMPETENT COUNSEL.

A defendant charged with Wilful Failure to Pay Taxes under 26 U.S.C. § 7203 can defend against the wilfulness element of the criminal charge by showing that he acted in

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[1] The impact of the decision in this case applied with equal validity to certified public accounts and accountants whose job it is to give advice on matters pertaining to the tax laws. Attorney Gertleson, in the instant case, was both an attorney and Certified Public Accountant.

strict accordance with the advice of a competent counsel that was given *after full disclosure of all material facts to the attorney*. *United States* v. *Eisenstein*, 731 F.2d 1540, 1545 (11th Cir. 1984).

As it was in the *Hatchett* case, this is often the only defense where the action taken proves in hindsight to be unlawful. Certainly, entities or persons attempting to comply with overwhelming federal and state regulations of business activity must regularly seek advice about proposed actions and generally have no other explanation for their actions other than that the actions were reviewed and cleared by their attorneys. The meetings where the actions are discussed with the attorneys are meetings generally attended only by the attorneys and the clients so that the confidentiality protected under the attorney/client privilege can be maintained.

II.

THE DISCLOSURES MADE TO AN ATTORNEY PRIOR TO OBTAINING ADVICE ARE PROHIBITED FROM DISCLOSURE TO A JURY AFTER THE DECISION IN *UNITED STATES* v *HATCHETT*.

The Honorable Judge of the Eastern District of Michigan ruled that the attorney from whom Hatchett obtained advice about payment of Hatchett's taxes was excluded from advising the jury at trial about the disclosures Hatchett made to the attorney before obtaining the advice. App. 64 The Court ruled this evidence to be hearsay, but later admitted that the evidence *would have been admissible to show the full disclosure element of the advice of counsel defense*. App. 41; 64 Counsel for Hatchett had sought to admit the evidence for *exactly that purpose of showing full disclosure* and had been denied that introduction of evidence by the Court during trial. App. 64

The diabolical nature of this ruling is masked by the simplicity of calling the evidence hearsay. If two people are

in a room and one of them says something to the other, how can the statement ever be introduced into evidence if the statement is not against the interest of the party seeking to introduce it? But yet it must be introduced if a defendant is to show full disclosure as part of an advice of counsel defense.

Pursuant to F.R.E. 801(c), the statement is hearsay as to both of the people in the room. No distinction is made in the rule for whether the declarant is the defendant or some other witness. When Gettleson was asked what Hatchett told him, an objection to any answer was sustained on the basis of hearsay. In so doing, the Court implicitly concluded that the statement was being offered to prove the truth of the facts stated by Hatchett, and not simply to prove that Hatchett told Gettleson these facts whether they were true-or not. The Trial Court recognized this when it later changed its position when ruling on the bond motion by stating that it might have admitted the statements for the limited purpose of showing disclosure.

Although Hatchett contends that the Trial Court was in error in its conclusion that the evidence sought from Gettleson was for any purpose other than to show disclosure, assuming *arguendo* that the Court was correct on this point, then *Hatchett would not have been allowed to testify to what he told Gettleson either.*

The information that Hatchett told Gettleson was not information that had been stated under oath during the Hatchett trial, or in any trial or hearing for that matter. These conversations took place in 1979 and 1980 — a full nine years before the trial and during the privacy of an attorney/client conference. *The statements were hearsay out of Hatchett's mouth just as they would have been out of Gettleson's.*

The only possible exception to this inescapable conclusion is not applicable in this case, but is found in F.R.E. 801(d)(1). This rule declares certain statements by a declarant not to be hearsay and states:

> PRIOR STATEMENT BY WITNESS: A statement is not hearsay if:
>
> (1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement *and* the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) *consistent* with the declarant's testimony *and is offered to rebut an express or implied charge against the declarant of* recent fabrication or improper influence or motive, of (C) one of identification of a person made after preceiving the person.
>
> (Emphasis supplied).

In Hatchett's trial, there was no claim of recent fabrication because the lawyer himself testified that his advice was sought and documentary evidence established that Hatchett had advised the IRS in writing on March 17, 1983 that he was continuing to withhold payment of the tax *based upon the advice of his accountant and lawyer.* App. 78 Nor was there a claim of a prior inconsistent statement. It must be assumed that Hatchett's statement of what he told Gettleson would in fact have been consistent with the known facts already divulged by the government's witnesses during the government's case-in-chief. The issue in Hatchett's trial was the fullness of the disclosure.

If Hatchett took the stand, his attempt to disclose the content of what he told Gettleson to satisfy his burden of

showing full disclosure would come during his direct examination by his lawyer. At this time, there would not have been any "express or implied charge" for Hatchett to rebut. Such a charge, if ever made, would only come during cross-examination. Thus, whereas any statement Hatchett made during direct examination regarding his conversations with Gettleson would have been properly objectionable by the government on hearsay and self-serving grounds, *Hatchett could never advise the jury of his prior consistent statements to Gettleson in 1979 and 1980 to prove the truth of the facts he told Gettleson unless and until the government chose to attack him under F.R.E. 801(d)(1) during cross-examination.*

The rule of prior consistent statements as substantive proof of the facts contained in the statements is one that requires the adverse party to "open the door" on cross-examination by challenging the veracity of the declarant under F.R.E. 801(d)(1)(B). If, as the Trial Court and the Majority Opinion of the Sixth Circuit suggest, Hatchett is required to prove full disclosure by offering into evidence statements "for the truth" contained therein, *the only way that any defendant can ever sustain a defense of advice of counsel would be for the government to let it happen.* Surely this is not what this Honorable Court meant when it stated that a defendant must be allowed the fundamental right to present a defense. *Chambers* v. *Mississippi*, 410 U.S. 284 (1983).

Eisenstein, *supra*, concluded that statements regarding disclosure were admissible for the purpose of proving full disclosure when advice of counsel was interposed as a defense to a specific intent crime. Any other result defeats the due process right of a defendant to present a meaningful defense at trial. *Chambers* v. *Mississippi*, *supra*.

The conclusion in *Eisenstein*, *supra*, is in accord with every reported federal and state decision on this issue prior to the *Hatchett* case. *United States* v. *McLennan*, 563 F.2d

943 (9th Cir. 1977), *cert. denied*, 435 U.S. 969, 985 (1978); *Matter of Patterson*, 70 B.R. 124, 131 (W.D. Mo. 1986); *Salem v. Kamberos*, 206 Ill. App.3d 686, 565 N.E.2d 6, 11-13 (1990); *Morin v. Mineau*, 112 Me. 471, 473, 92 A. 527, 528 (1917); *Tate v. Connel*, 3 Ariz. App. 534, 416 P.2d 213 (1979).

III.

THE GETTLESON TESTIMONY WAS RELEVANT TO HATCHETT'S DEFENSE.

The Trial Court, and the Majority Opinion of the Sixth Circuit, concluded that the relevance of the Gettleson testimony regarding disclosures made by Hatchett to Gettleson was dependent upon the jury believing the *truth* of what Gettleson testified to at trial and was therefore inadmissible as hearsay. App. 14; 41 This conclusion was erroneous because it is not the province of the jury to decide relevance at all. It is the duty of the Court to decide whether testimony has the tendency to make the existence of a fact of consequence to the determination of an action more or less probable and to admit that evidence which has such a tendency. F.R.E. 401.

In Hatchett's case, no evidence was more relevant than evidence tending to show whether he was wilful in failing to pay taxes. The act of failing to pay was uncontested and the defense hinged upon *mens rea*. The only evidence of Hatchett's state of mind, however, was withheld from the jury. By withholding this evidence from the jury, Hatchett was prevented from presenting his version of the facts to the jury, and indeed, the jury was left with no evidence whatsoever about Hatchett's state of mind. Such a result has led this Honorable Court to state in *Washington v. Texas*, 388 U.S. 14, 19 (1967) that:

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain

> terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of Due Process of Law.

The Trial Court committed error of constitutional proportions when it failed to accord Hatchett the *fundamental right* to present the testimony of Gettleson in Hatchett's defense. *Chambers* v. *Mississippi*, *supra*, 410 U.S. at 302.

The Trial Court should have admitted Gettleson's testimony regarding disclosures made by Hatchett because the testimony was not only relevant but was in fact crucial to Hatchett's defense. The jury would then determine what weight to give the testimony based upon its evaluation of the evidence against all of the other evidence in the record.

CONCLUSION

The decision of the Trial Court in the *Hatchett* case makes it impossible for attorneys to render advice to clients on important prospective matters because that advice is no protection whatsoever in the Sixth Circuit against a charge of wilful violation of the law. The decision also prevents trial counsel from ever presenting the advice of counsel defense to a jury at trial. The rule of law has been significantly changed in the Sixth Circuit in such a manner as to defeat the best efforts of lawful entities and individuals to determine in advance that their prospective actions comport with the law and also renders them vulnerable to a hindsight determination that their actions *based on competent legal advice after full disclosure of facts* violated the law. The decision violates the unbroken line of precedent in both federal and state jurisdictions that have considered

the issue. The decision should be overturned as a violation of fundamental constitutional protection.

Respectfully submitted,

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DATED: May 6, 1991

APPENDIX

• • •

The Appendix attached to the Petition for Writ of Certiorari filed by Petitioner is incorporated herein by reference as if fully set forth. All references herein to the Appendix refer to said Appendix.